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IN THE

United States Supreme Court

TED HERRING,

Petitioner.

v.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 27, 2005

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Eleventh Circuit erred in denying a meritorious claim under *Clemons v. Mississippi*, 494 U.S. 738 (1990) by applying a standard of procedural default that directly conflicts with this Court's decisions in *Miller-El v. Dretke*, No. 03-9659, 2005 WL 1383365 (U.S. June 13, 2005) and *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

2. Whether the Eleventh Circuit erred in denying, without the benefit of a state or federal evidentiary hearing, a claim of ineffective assistance of counsel where defense counsel's performance fell below the standard of diligence established by this Court in *Rompilla v. Beard*, No. 04-5462, 2005 WL 1421390 (U.S. June 20, 2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000).

3. Whether the Eleventh Circuit erred in declining to grant a certificate of appealability to consider a claim pursuant to *Estelle v. Smith*, 451 U.S. 454 (1981), where a probation officer had interviewed a defendant while in custody, failed to administer *Miranda* warnings, and elicited racially inflammatory statements that were introduced without any prior notice at trial.

LIST OF PARTIES

Petitioner Ted Herring is the only party seeking review of the judgment below.

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Ted Herring ("Herring" or "petitioner") respectfully petitions this Court for a writ of certiorari to review the March 29, 2005 and January 31, 2005 decisions of the Eleventh Circuit, the former denying his petition for rehearing or rehearing *en banc* and the latter affirming the denial of his petition for a writ of habeas corpus.

OPINIONS AND ORDERS BELOW

The judgment and sentence of the Volusia County, Florida Circuit Court was entered on March 1, 1982. (A-6.[1]) The findings of the trial judge with respect to aggravating and mitigating circumstances were entered on March 1, 1982. (A-8.) The decision of the Florida Supreme Court affirming Herring's conviction and death sentence is reported at *Herring v. State*, 446 So. 2d 1049 (Fla. 1984). (A-15.) The order of the Florida Circuit Court denying Herring's Rule 3.850 Motions to Vacate Judgment was entered on July 25, 1985. (A-78.) Decisions of the Florida Supreme Court addressing and ultimately denying Herring's 3.850 motions, entered on December 30, 1986, June 23, 1988, and May 2, 1991, are reported at *Herring v. State*, 501 So. 2d 1279 (Fla. 1986), *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988), and *Herring v. State*, 580 So. 2d 135 (Fla. 1991). (A-33, 40, 48.) The decision of the United States District Court for the Middle District of Florida denying Herring's petition for a writ of habeas corpus was entered on April 14, 2003 (A-88.) The decision of the United States Court of Appeals for the Eleventh Circuit affirming the district court, entered on January 31, 2005, is reported at *Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338 (11th Cir. 2005). (A-147.) The Eleventh Circuit denied Herring's petition for rehearing or rehearing en banc on March 29, 2005. (A-189.)

[1] The Appendix hereto is cited as "A-__."

JURISDICTION

The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because it is appealed from a final decision of the United States Court of Appeals for the Eleventh Circuit and is filed within ninety days of the Eleventh Circuit's denial of rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition is concerned with the interpretation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. The 7-Eleven Shooting

Early on May 29, 1981, a 7-Eleven store clerk in Daytona Beach, Florida was shot twice and killed during a robbery at the store. On the morning of June 12, 1981, Herring was arrested on an unrelated charge and taken to the Daytona Beach Police Station where he was asked to sign a consent to interrogation form. He signed the form and was interrogated without counsel for eight hours. (Vol. 3 at 20, 22, 31.)[2]

During the interrogation, Herring confessed to the robbery and homicide. (*Id.* at 102-29.) Herring stated that he entered the 7-Eleven store early on the morning of May 29. He requested a pack of cigarettes, drew his gun, and demanded money. The clerk made a sudden move, which caused Herring to panic and shoot. The shooting was not intentional and was certainly not planned—in the course of

[2] "Vol." refers to the Index to Advance Appendix filed with the federal district court.

four other similar armed robberies during the same time period to which Herring confessed, he had never fired his gun or harmed anyone. (*Id.* at 103-09.) Herring stated in his taped confession: "When I went to turn my head a little bit, I turned back and it looked like he was coming across the counter and I put the gun up to his head and he put his hand up and I shot him." (*Id.* at 126-27.) Herring further stated that he shot the clerk "by mistake" and "out of fear." (*Id.* at 127, 128.)

B. Herring's Trial Counsel

Herring was represented by two Assistant Public Defenders: Howard Pearl, who handled the guilt phase, and Peyton Quarles, who handled the sentencing phase. Pearl had prior capital litigation experience; Quarles had none.

C. The Homicide Trial

1. The Guilt Phase

At Herring's murder trial, no witness testified that he saw or heard the killing, and no murder weapon was introduced in evidence. (Vol. 5 at 395-487; Vol. 6 at 488-628.) The State's case relied exclusively on Herring's taped confession; the testimony of law enforcement witnesses; and physical evidence, such as a handwritten note demanding money found at the crime scene. (*Id.*)

Herring's trial testimony contradicted his taped confession. Herring (who was 19 years old at the time of the crime, had an I.Q. of 72, and had been previously diagnosed as brain damaged) testified that, although he intended to rob the store, another man followed him into the store, and robbed and killed the clerk. Pearl and Quarles allowed Herring to testify that another man shot the clerk even though they both believed that Herring's trial testimo-

ny was not credible and would not convince the jury. (Vol. 34 at 191, 194; Vol. 36 at 400, 401.) On February 25, 1982, the jury returned a verdict of guilty. (Vol. 1 at 70-72.)

2. The Penalty Phase

The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the guilt phase. It lasted approximately two hours. The State offered into evidence the testimony of a probation officer, Mary White, who interviewed Herring while he was in custody at the Volusia County Jail. (Vol. 7 at 777-79.) Over defense counsel's objection, she testified that Herring had said that the 7-Eleven clerk "got what he deserved," and that his death meant "just one less cracker." (*Id.*) The trial judge allowed Ms. White to repeat the statement *three times* to Herring's all-white jury. Ms. White's interrogation of Herring had not been preceded by *Miranda* warnings, and the State introduced this testimony without providing the notice required by Rule 3.220 of the Florida Rules of Criminal Procedure, which requires the State to advise defense counsel of all statements of the defendant which it intends to offer in evidence. The defense first learned of these statements when they were offered at trial. (Vol. 7 at 757-58, 777-78.)

In preparation for the sentencing phase, Quarles did not conduct any investigation into Herring's background to find mitigating evidence. Quarles, who had never tried a capital case, only offered one witness in mitigation, Herring's mother. (Vol. 12, Exs. 7-12 to Mot. to Vacate Judgment and Sentence, filed Apr. 2, 1985; Vol. 7 at 780-84; Vol. 32, #18C at 137.) Her direct testimony, and thus Herring's case, lasted only a few minutes and constitutes less than four pages of transcript. (Vol. 7 at 780-84, 790.) Quarles used Herring's mother as a vehicle to testify to con-

cepts, such as her son's I.Q., which she was forced to acknowledge she did not understand. (*Id.* at 786.) On cross-examination, she conceded that she would say anything to save her son. (*Id.* at 789-90.)

Quarles also failed to submit documentary evidence of Herring's mental retardation and brain damage, which were in Quarles' possession. Quarles had records from St. Luke's Hospital in New York stating that Herring had signs of "brain dysfunction," "neurological dysfunction," "psychoneurotic disorder," and that he was "undoubtedly functionally retarded." (Vol. 12, *supra*, Ex. 3.) He never submitted these records. The jury returned an advisory sentence of death by an eight-to-four vote. (Vol. 1 at 823-27.)

The trial judge sentenced Herring to death on March 1, 1982. (*Id.* at 73-77.) In imposing sentence, the trial judge found that four aggravating circumstances and two mitigating circumstances applied:

Aggravating Circumstances

(1) that the defendant had been previously convicted of another capital offense or a felony involving the use or threat of violence to some person;

(2) that the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery;

(3) that the crime for which the defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody ("the avoidance of arrest aggravator"); and

(4) that the crime for which the defendant was to be sentenced was committed in a cold, calculated, and pre-

meditated manner without any pretense of moral or legal justification ("the heightened premeditation aggravator.")

Mitigating Circumstances

(1) the age of the defendant at the time of the crime; and

(2) the defendant's difficult childhood, i.e., that the defendant was raised essentially without a father, that he was hyperactive, had learning disabilities, and had trouble in school.

D. Post-Conviction Proceedings

The Supreme Court of Florida affirmed the judgment and sentence. *Herring v. State*, 446 So. 2d 1049 (Fla. 1984) (A-15). Decisions of the Florida Supreme Court affirming the denial of Herring's first motion to vacate pursuant to Fla. R. Crim. P. 3.850 and his petition for a writ of habeas corpus are reported at *Herring v. State*, 501 So. 2d 1279 (Fla. 1986), and *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988) (A-33, 40).

On March 9, 1989, Herring filed a second motion to vacate his sentence. It relied on *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), in which the Florida Supreme Court had declared the heightened premeditation aggravator inapplicable to Herring. The trial court denied relief under *Rogers*, but granted Herring leave to amend his Rule 3.850 motion to add an unrelated claim based on trial counsel's conflict of interest. The trial court denied the amended motion.

On appeal, the Supreme Court of Florida vacated the heightened premeditation aggravator but refused to grant a new sentencing hearing. The court did, however, remand for an evidentiary hearing on Herring's conflict claim. *See Herring v. State*, 580 So. 2d 135, 138 (Fla. 1991).

On remand, the trial court twice denied Herring's conflict of interest claim. The first such denial was reversed and remanded, *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996), and the second denial was affirmed. *Herring v. State*, 730 So. 2d 1264 (Fla. 1998).

On October 22, 1999, Herring filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. On April 14, 2003, the district court denied Herring's petition without a hearing and on June 18, 2003 denied a certificate of appealability. On August 21, 2003, a panel of the Eleventh Circuit granted Herring's certificate of appealability as to three issues and denied it as to eight other issues. On January 31, 2005, the Eleventh Circuit affirmed the denial of Herring's federal habeas petition. *Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338 (11th Cir. 2005). Rehearing and rehearing en banc were denied on March 29, 2005.

REASONS FOR GRANTING THE PETITION

This case involves an unplanned and probably accidental convenience store murder that should never have resulted in the death penalty. Herring faces execution because of an unfortunate combination of circumstances that tainted his sentence and give rise to this petition: he was represented by an inexperienced public defender who conducted absolutely no investigation and presented almost no mitigation evidence; the State introduced at the penalty phase a racially inflammatory statement made by Herring that was elicited without *Miranda* warnings and presented without notice; although the Florida Supreme Court revoked an improper aggravator, it failed to accord Herring the resentencing proceeding to which he was entitled by the clear mandate of this Court.

The petition should be granted for three reasons. First, the decision of the Florida Supreme Court upholding Herring's death sentence is directly contrary to this Court's holding in *Clemons* and *Sochor v. Florida*, 504 U.S. 527 (1992). When the Florida Supreme Court vacated one of the four aggravating circumstances originally applied by the sentencing judge, Herring argued that *Clemons* required either a remand for resentencing, an independent reweighing of the aggravating and mitigating circumstances, or a harmless error analysis. The Florida Supreme Court did none of these and summarily upheld Herring's death sentence.

The Eleventh Circuit nevertheless declined to vacate the sentence and concluded that Herring's *Clemons* claim was procedurally defaulted because Herring had not presented the claim in identical language in state and federal court. The Eleventh Circuit's analysis cited no precedent and is directly contrary to this Court's holding that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to [reciting] arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). This principle was recently reaffirmed by this Court in *Miller-El v. Dretke*, No. 03-9659, 2005 WL 1383365, at *8 n.2 (U.S. June 13, 2005). The Eleventh Circuit's analysis of procedural default also is contrary to the analyses of the Sixth, Seventh, and Ninth Circuits.

Second, Herring was deprived of the effective assistance of counsel at the sentencing phase of the criminal trial. In the sentencing phase, Herring was represented by Peyton Quarles, who was trying his first capital case. His performance plainly failed to meet the standards established by this Court in *Rompilla v. Beard*, No. 04-5462, 2005 WL 1421390 (U.S. June 20, 2005), *Wiggins v. Smith*, 539 U.S.

510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). The entire mitigation case consisted of the direct testimony of Herring's mother, and covered approximately four pages of transcript. Quarles failed to present evidence available to him that demonstrated, among other things: that as a child, Herring was diagnosed as brain damaged; that he was also diagnosed with "neurological dysfunction," and "psychoneurotic disorder," and that test scores disclosed an I.Q. of 72. Quarles instead attempted to introduce evidence of Herring's I.Q. through his mother, who was forced to acknowledge on cross-examination that she did not understand what it meant.

No evidentiary hearing on this ineffectiveness claim was held in either state or federal court. At a minimum, the Eleventh Circuit should have remanded to the district court for an evidentiary hearing to resolve the factual issues raised on Herring's claim of ineffective assistance of counsel. Instead, the Eleventh Circuit conducted an independent review of the record, although the facts had never been developed either in discovery or a hearing. The court found the *Wiggins/Williams* test satisfied by evidence that Quarles had consulted a psychiatrist on the issue of Herring's sanity and fitness to stand trial. On that basis, the court concluded that Quarles had made a "tactical decision" not to present mitigation evidence, a conclusion for which there is absolutely no evidentiary support. The court reached its conclusion based on a selective review of deposition transcripts and overlooked testimony in the same transcripts reflecting that Quarles's investigation was not the result of reasonable professional judgment. The Eleventh Circuit's analysis is an unreasonable application of this Court's decisions in *Williams* and *Wiggins*, and the

Eleventh Circuit's fact finding is contrary to *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

Third, the Eleventh Circuit erred in declining to grant a certificate of appealability to consider a meritorious claim under *Estelle v. Smith*. Herring was interviewed by a probation officer while in custody. No *Miranda* warnings were given, and racially inflammatory statements attributed to Herring were introduced by the State, without appropriate prior notice, at the sentencing hearing. The Florida Supreme Court denied this claim because it concluded that Herring had previously been given *Miranda* warnings when questioned by police officers during a separate interview. Because no evidentiary hearing was held on this claim, the record does not disclose the time interval between his police interrogation and his probation interview. It could have been as long as seventeen days.

I. IN SUMMARILY UPHOLDING HERRING'S DEATH SENTENCE DESPITE THE ELIMINATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE, THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT ACTED CONTRARY TO *CLEMONS* AND *SOCHOR*

A. The Decisions of the Florida Supreme Court and the Eleventh Circuit in Herring's Case are Directly Contrary to *Clemons* and *Sochor*

Under *Clemons*, a state supreme court reviewing a death sentence affected by an invalid aggravating circumstance has three options: (a) remand for a new sentencing hearing; (b) independently reweigh the aggravating and mitigating circumstances; or (c) make an individualized determination, based on the particular facts of the case, that the error

was harmless. *Hopkins v. Reeves*, 524 U.S. 88, 92-93 (1998); *Sochor*, 504 U.S. at 532; *Clemons*, 494 U.S. at 754; (A-155). This Court has held that, absent written evidence of the required independent reweighing, a conclusory statement that the state court has conducted the mandatory analysis will not suffice because "we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence." *Clemons*, 494 U.S. at 752. The alternative harmless error analysis mandated by this Court requires both a clear statement by the state supreme court that it is conducting such an analysis *and* an individualized description of why the error is harmless. *Clemons*, 494 U.S. at 752-53; *Sochor*, 504 U.S. at 539-40.

In Herring's case, the Florida Supreme Court vacated the heightened premeditation aggravating circumstance. *Herring v. State*, 580 So. 2d 135, 138 (Fla. 1991) (A-53). That left three aggravators and two mitigating circumstances remaining. However, the Florida Supreme Court did not follow *Clemons*. It upheld the death sentence with only the most perfunctory analysis; it neither reweighed the aggravating and mitigating circumstances, conducted a harmless error analysis, nor remanded for resentencing.

There is absolutely no question that the Florida Supreme Court's opinion in *Herring* failed the *Clemons* test. This certainty is the product of an unusual coincidence: another opinion of the Florida Supreme Court, *Sochor v. Florida*, 580 So. 2d 595 (Fla. 1991), *rendered on the same day, May 2, 1991, and employing virtually identical reasoning*, was vacated by this Court. *Sochor*, 504 U.S. at 539-40. The language and reasoning of the Florida Supreme Court in

Herring and *Sochor* were uncannily similar. In *Sochor*, the court upheld the death penalty because

> [e]ven after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. . . . Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

Id. at 531 (citations omitted).

There is no substantive difference between the Florida Supreme Court's reasoning in *Sochor* and its reasoning in Herring's case, where it held that

> [g]iven the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.

Herring, 580 So. 2d at 138 (A-54).[3]

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[3] The Florida Supreme Court reasoned that "[n]one of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed." *Herring*, 580 So. 2d at 138. In *Sochor*, the elimination of the cold, calculated and premeditated aggravator also did not change the facts regarding the manner in which the murder was committed. *Sochor v. State*, 580 So. 2d 595, 603 (Fla. 1991).

The similarity of the two opinions is not surprising: both *decisions were rendered on the same day, both vacated the* same aggravating circumstance, and both nevertheless affirmed the death penalty. This Court vacated the death sentence in *Sochor*, holding that the Florida court's reasoning was insufficient to demonstrate that it had engaged in harmless error analysis that met the requirements of *Clemons*, 504 U.S. at 539-40. The case for vacation of the death sentence is, if anything, even stronger here: in *Sochor*, there were no mitigating circumstances to weigh against the three remaining aggravators; in Herring's case, two mitigating circumstances weighed against three remaining aggravators. Because the opinions of the Florida Supreme Court were all but identical, and were unquestionably prompted by the same mistaken reasoning, Herring is entitled to the same result this Court directed in *Sochor*. Accordingly, this Court should summarily reverse and remand for further proceedings consistent with *Clemons* and *Sochor*.[4]

B. The Eleventh Circuit Adopted an Improper Definition of Procedural Default to Avoid Addressing a Meritorious Claim Under *Clemons* and *Sochor*

The Eleventh Circuit never addressed the merits of Herring's *Clemons* claim; it simply held that the claim was procedurally defaulted. It conceded that, in his motion for

[4] Unlike Sochor, Herring did not immediately petition for certiorari review of the Florida Supreme Court's decision. In that same decision, that court remanded for an evidentiary hearing on Herring's claim that his trial counsel suffered from a conflict of interest. *Herring*, 580 So.2d at 136 (A-49). Herring proceeded to litigate that claim in the Florida state courts for the next seven years.

rehearing, Herring had attacked the Florida Supreme Court's decision on three separate grounds and relied extensively on *Clemons* in his arguments. (A-158.) It nevertheless concluded that "although Herring challenged the court's finding of harmless error, he did not assert the court *failed to engage* in harmless error analysis." (A-159 (emphasis in original).) If there is any distinction between these two arguments, it is a distinction without a difference. It is certainly not a difference sufficient to justify a finding that Herring's *Clemons* claim is procedurally defaulted. The Eleventh Circuit cited not a single case to support such an unduly restrictive definition of procedural default. In fact, Herring's argument has never materially changed since it was first presented; it is that the Florida Supreme Court failed to perform the analysis mandated by *Clemons*. This Court has already recognized the deficiencies of the Florida Supreme Court's *Sochor* decision, a case with reasoning indistinguishable from Herring's. The Eleventh Circuit avoided the force of this Court's *Sochor* decision only by resorting to an indefensible definition of procedural default.

Herring raised the *Clemons* claim properly, and at the earliest possible opportunity. *Clemons* was decided on March 28, 1990, after Herring filed his opening brief in the Florida Supreme Court on March 12, 1990. Herring cited *Clemons* in his reply brief, dated May 21, 1990. After the Florida Supreme Court rendered its decision on May 2, 1991, Herring filed a rehearing motion on May 16, 1991, pointing out that court's failure to follow *Clemons*. In Herring's case, the *Clemons* error occurred when the Florida Supreme Court failed to conduct the constitutionally required analysis following the elimination of the heightened premeditation aggravator, and the claim of constitutional error could not have been raised earlier. *See, e.g.*,

Davis v. Singletary, 119 F.3d 1471, 1481 (11th Cir. 1997) (*Clemons* claim may be asserted in motion for rehearing).

The Eleventh Circuit's finding of procedural default ignores the fundamental difference between preserving a claim and asserting an argument in support of that claim, a difference recognized by this Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534. In *Yee*, this Court held that "[h]aving raised a taking claim in the state courts . . . petitioners could have formulated any argument they liked in support of that claim." *Id.*; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381-83 (1995). Similarly, in *Miller-El v. Dretke*, No. 03-9659, 2005 WL 1383365, at *8 n.2, 27 (U.S. June 13, 2005), petitioner brought a *Batson* claim in the state courts. *Id.* In his federal habeas petition, petitioner made additional arguments in support of his *Batson* claim that were not presented in the state court proceedings, *id.*, and this Court held that petitioner had not waived the right to present those arguments because there is a distinction "between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id.* at *8 n.2.

The Eleventh Circuit's analysis also conflicts with the decisions of the Sixth, Seventh, and Ninth Circuits, which have held that once a federal claim is preserved, an appellant "can make any argument it wishes in support of that claim." *Gallenstein v. United States*, 975 F.2d 286, 290 n.4 (6th Cir. 1992); *Bew v. City of Chicago*, 252 F.3d 891, 895-96 (7th Cir. 2001); *Ballaris v. Wacker Siltronic Corp.*, 370

F.3d 901, 908 (9th Cir. 2004); *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004).

Herring preserved his *claim* under *Clemons*. In *Baldwin v. Reese*, 541 U.S. 27 (2004), this Court held that a litigant could indicate the federal nature of a claim "by citing in conjunction with the claim the federal source of law on which he relies *or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'*" *Id.* at 32 (emphasis added). The Eleventh Circuit did not dispute that Herring asserted a constitutional claim under *Clemons* in the Florida Supreme Court. (A-158; *see supra* p. 14.)

Federal courts have considered *Clemons* claims that were never raised in the state courts. *See, e.g.*, *Williams v. Clarke*, 40 F.3d 1529, 1534-40 (8th Cir. 1994). Moreover, this Court granted Sochor's petition for *certiorari* and reversed his death sentence even though Sochor never cited *Clemons* to the Florida Supreme Court.[5]

Furthermore, the State never claimed procedural bar and expressly acknowledged that Herring had asserted his *Clemons* claim in the Florida Supreme Court, and that "the Florida Supreme Court decided this claim on the merits." (State's Resp. to Pet. for Writ of Habeas Corpus, filed Feb. 4, 2000, at 33-34). Thus, the State has waived its claim of procedural default. *See Gray v. Netherland*, 518 U.S. 152,

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[5] Even if Herring's *Clemons* claim were procedurally barred (which it is not), this Court should consider the merits of Herring's claim under *Clemons*. "[T]his Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319-20 (1995). In Herring's case, the decision of the Florida Supreme Court upholding Herring's death sentence is directly contrary to this Court's holdings in *Clemons* and *Sochor*, and principles of equity require that the *Clemons* claim be considered on the merits.

166 (1996). As the Eleventh Circuit has recognized, it is the state that is "in the best position to know whether, in the interests of justice, its [procedural default rule] needs—indeed deserves—federal court vindication." *Esslinger v. Davis*, 44 F.3d 1515, 1527-28 (11th Cir. 1995); *see also Boykins v. Wainwright*, 737 F.2d 1539, 1545 (11th Cir. 1984). In light of the State's concession that the Florida Supreme Court reached the merits of Herring's claim, the district court's *sua sponte* invocation of procedural default was an abuse of discretion. *Esslinger*, 44 F.3d at 1528-29.[6]

Herring is entitled to the same result that this Court ordered in *Sochor*: vacation of his death sentence. The Eleventh Circuit strained to avoid this result by applying an erroneous and unprecedented standard of procedural bar. If this Court does not summarily reverse pursuant to *Clemons*, it should grant this petition, vacate, and remand to the Eleventh Circuit for further proceedings in light of this Court's intervening decision in *Miller-El*. *Miller-El*, 2005 WL 1383365, at *8 n.2, 27.

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[6] In a confusing aside, the Eleventh Circuit noted that Herring had failed to raise the question of procedural default in his initial appeal brief. (A-155.) Here, too, the court elevated form over substance. The issue was fully presented to and considered by the court below. The State raised the procedural bar issue in its brief, Herring responded in the reply brief, and the Eleventh Circuit accepted a further letter-brief from the State following the oral argument and invited Herring to submit a letter-brief. Of course, the Eleventh Circuit has previously acknowledged that briefs "should be read liberally to ascertain the issues raised on appeal." *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994). Herring's initial brief was predicated on the threshold issue that his *Clemons* claim was not defaulted. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002); *United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-48 (1993).

II. HERRING WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL

A. The Eleventh Circuit Decision is an Unreasonable Application of *Rompilla*, *Williams*, *Wiggins*, and *Strickland*

The performance of Herring's sentencing phase counsel, Peyton Quarles, fell far short of the standard established by the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), and *Williams v. Taylor*, 529 U.S. 362 (2000), and just reaffirmed in *Rompilla v. Beard*, No. 04-5462, 2005 WL 1421390 (U.S. June 20, 2005). A review of the trial record discloses that the mitigation investigation Quarles undertook was not even as extensive as the investigations that this Court found deficient in these three cases. Further, Herring has never been given an evidentiary hearing on his ineffective assistance claim in either state or federal court, notwithstanding the Eleventh Circuit's clear direction that a hearing be conducted where the state court has not held a hearing to develop adequately the material facts and a complete record. *Agan v. Dugger*, 835 F.2d 1337, 1340 (11th Cir. 1987); *see also Wiggins*, 539 U.S. at 515-18, 530-34.

Quarles' investigation of mitigating circumstances was deficient in that he failed to investigate and present readily available evidence of mental retardation and of Herring's background and good character traits. (*See supra* p. 5.) He only offered one witness in mitigation, Herring's mother. *Id.* Her direct testimony, and thus Herring's case, lasted only a few minutes and constitutes less than four pages of transcript. *Id.* Quarles used Herring's mother as a vehicle

to testify to concepts, such as her son's I.Q., which she was forced to acknowledge she did not understand. *Id.* Quarles also failed to submit, and to follow-up on, documentary evidence of Herring's mental retardation and brain damage, which were *in Quarles'* possession.[7]

In *Williams v. Taylor*, as in Herring's case, trial counsel had "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood," as well as "evidence that [the defendant] was 'borderline mentally retarded.'" 529 U.S. at 395-96. This Court held that trial counsel's failure to investigate could not be justified as tactical and "clearly demonstrate[s] that trial counsel did not fulfill *their obligation to conduct a thorough investigation of the defendant's background.*" *Id.* at 396 (emphasis added). This Court further emphasized this doctrine in *Rompilla*, 2005 WL 1421390, at *8, in which it held that counsel has a duty to "explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

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[7] Herring's present counsel has located additional records, which would have been available to Quarles. These include school records containing (i) reports stating that Herring was required to repeat the first grade and showing that when Herring was in third grade, he was functioning at the 1.6th grade level; (ii) reports prepared when Herring was fifteen years old stating that he did not know the sequence of the seasons and did not know what makes a sailboat move; and (iii) reports prepared when Herring was fifteen years old stating that he was "exceptionally handicapped" in "coordinating movements of his eyes and his hands," could not readily distinguish between his left and his right, and had "directionality confusion as to which way to move." The reports identifying Herring's difficulties with "spatial visualization" also may explain why Herring shot the clerk "by mistake," in response to what was perceived to be a threatening movement.

B. The Eleventh Circuit Denied Herring's Claim by Engaging in Improper Appellate Fact-Finding

In rejecting Herring's claim of ineffective assistance, the Eleventh Circuit relied extensively on ambiguous record evidence never before cited by any state or federal court and never cited by the State in any brief. (A-167-170.) The Eleventh Circuit embarked on this review without the benefit of any evidentiary hearing or any meaningful discovery concerning Quarles' performance.

The Eleventh Circuit opinion included certain crucial findings never before made by any court: (1) that Quarles "did consult an expert," Dr. William Friedenberg, regarding Herring's mental problems, and (2) that "the case Quarles put on was the product of a tactical decision made after investigation." (A-170.) The Eleventh Circuit engaged in impermissible appellate fact-finding. This Court has held that "[i]f the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. . . . But it should not simply have made factual findings on its own." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Amadeo v. Zant*, 486 U.S. 214, 228 (1988). The Eleventh Circuit's analysis also conflicts with the decisions of the Fifth, Seventh, and Federal Circuits holding that "an appellate court cannot make its own findings of fact." *In re Marchiando*, 13 F.3d 1111, 1114 (7th Cir. 1994); *Hensley v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000) (it is a "general rule that appellate tribunals are not appropriate fora for initial fact finding."); *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004).

The new facts that the Eleventh Circuit found are based on a selective review of the record. Quarles sought Dr. Friedenberg's assistance to determine whether Herring was competent to stand trial or insane at the time of the offense. (Vol. 9 at 919-20.) Friedenberg was never asked to help prepare for the sentencing phase of the trial. Quarles' deposition testimony reflects that his discussions with Dr. Friedenberg, and any other mental health experts Quarles may have approached, focused exclusively on whether Herring was insane; Dr. Friedenberg never considered the issue of mitigation. Competence to stand trial and sanity at the time of the homicide are guilt-innocence phase issues that do not bear on mitigating circumstances relevant to sentencing. *Hardwick v. Crosby*, 320 F.3d 1127, 1157 n.134 (11th Cir. 2003).

Evidence of Herring's mental problems would have constituted strong evidence in support of the nonstatutory mitigators even if no doctor had found him insane or incompetent to stand trial: "There is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death. Indeed, we have held that a defendant's IQ score of 79, a score slightly higher than petitioner's, constitutes relevant mitigation evidence." *Smith v. Texas*, 125 S. Ct. 400, 405 (2004). In *Smith*, this Court also held that "none of our prior opinions 'suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered.'" *Id.*; *Baxter v. Thomas*, 45 F.3d 1501, 1515 (11th Cir. 1995).

In *Rompilla*, sentencing phase counsel met with Rompilla as well as five family members in preparation for the sentencing phase and consulted with three mental health experts in preparation for the guilt phase, whose reports "revealed 'nothing useful' to Rompilla's case." *Rompilla*, 2005 WL 1421390, at *6. Rompilla's counsel, however, did not examine a "readily available file" that the State intended to use against Rompilla that contained, among other things, "test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling." *Id.* at *7-8, 10. Those records "pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard." *Id.* at 10. This Court held that "'[i]t is the duty of the lawyer . . . to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" *Id.* at *8 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).) This Court further held that "[t]he jury never heard any of this [evidence located in the files counsel failed to review] and neither did the mental health experts who examined Rompilla before trial. While they found 'nothing helpful to [Rompilla's] case," their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of 'red flags' pointing up a need to test further." *Id.* at *10.

In Herring's case, Quarles failed to investigate for evidence of mental retardation and brain damage that was readily available. (*See supra*, p. 19 n.7.) Quarles failed to introduce the evidence of mental health problems that was in his possession. (*See supra*, p. 4-5, 9, 18-19.) As a result of Quarles' deficient performance, the State was able to

argue to the jury in summation that Herring's counsel had not adduced any competent evidence regarding Herring's I.Q. The prosecutor told the jury "[y]ou have some testimony from his mother that he may have, at some point in time, had a learning disability. Or he may have had an IQ of 80. Whether that is, in fact, low or high, we have no evidence to that." (Vol. 7 at 803.) Further, if, as the Eleventh Circuit suggested, Quarles relied on Dr. Friedenberg's opinion on competence and sanity in deciding to terminate his investigation for mitigating evidence, that decision cannot constitute "reasoned strategic judgment" under *Wiggins* and *Rompilla*. *Wiggins*, 539 U.S. at 534, *Rompilla*, 2005 WL 1421390, at *10. The Eleventh Circuit found that Dr. Friedenberg gave considerable importance to the I.Q. tests that Quarles provided to him, but Quarles did not provide Dr. Friedenberg with a copy of the most accurate I.Q. test of Herring, which indicated that Herring had a full-scale I.Q. score of 72. Instead, Quarles only gave him reports indicating I.Q. scores of 80 and 82 and "Dr. Friedenberg said the consistency of the two results led him to believe it was not necessary to readminister an IQ test." (A-168; Vol. 9 at 907-08, 916).

The Eleventh Circuit's impermissible fact-finding is based in significant measure on a deposition given by Quarles.[8] The Eleventh Circuit "found" several facts to support its conclusion, but failed to mention other facts in that same deposition that strongly support Herring's claim that Quarles performed poorly. At his deposition, Quarles testified: (i) an investigator was assigned to Herring's case

[8] That deposition was conducted in connection with an unrelated claim of conflict of interest of Herring's guilt-phase counsel, Howard Pearl.

but was not used to prepare for the sentencing phase (Vol. 23 at 295); (ii) no investigation was conducted in preparation for the sentencing phase, except for Quarles' interview of Herring and his mother; in his deposition Quarles belittled his own efforts by describing it as an investigation "in quotation marks" (Vol. 23 at 295-96, 323-24); (iii) Herring had "no clue as to what was going on in real life" and his level of intelligence was an impediment to the preparation of the sentencing phase (Vol. 23 at 324, 358); (iv) Quarles had in his possession records from St. Luke's Hospital in New York indicating that Herring was retarded and suffered from neurological dysfunction; he claimed not to be able to authenticate these records to put them in evidence, although he conceded that he could have sought an order to have Volusia County pay for the deposition of a records custodian, but made no effort to do so (Vol. 23 at 327-30); and (v) Quarles made no effort to locate character witnesses, other than talk to Herring and his mother about the possibility of offering character witnesses at the sentencing phase. (Vol. 23 at 331-33). Had he conducted an investigation into Herring's background, Quarles readily would have found a teacher, a child care worker, relatives, and a neighbor of Herring who all knew him well and were willing and ready to testify on his behalf. (Exs. 7-12 in Herring's First FRCP 3.850 Motion, dated April 2, 1985).

The Eleventh Circuit also found that certain rulings of the Florida courts were supported by the record, such as the ruling that the psychological reports that Quarles failed to introduce or discover "would have been cumulative to the mother's testimony." (A-163; Vol. 12, Herring's First FRCP 3.850 Motion ¶¶86-90.) Under *Williams*, 529 U.S. at 399, this finding is clearly erroneous. Herring's mother possessed no knowledge of mental health issues. It is ludi-

crous to conclude that the testimony of a well-qualified professional who had conducted a detailed evaluation of Herring would have been merely cumulative.[9]

Herring is entitled to a new sentencing hearing or at a minimum an evidentiary hearing on his ineffective assistance claim, *see Wiggins*, 539 U.S. at 515-18, 521-34, *Williams*, 529 U.S. at 370-73, 393-96, and improper appellate fact-finding is no substitute for that hearing. Without an evidentiary hearing, there is no basis for the conclusion that anything Quarles did in connection with the sentencing hearing was strategic, and the Eleventh Circuit's opinion to the contrary is insupportable. In *Wiggins*, this Court noted: "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." 539 U.S. at 526-27. In its selective use of Quarles' testimony, the Eleventh Circuit failed to cite his testimony in open court that "I did a lousy job." (Vol. 32, #18C at 147-48.)

If this Court does not grant *certiorari* outright, it should, at a minimum, grant this petition, vacate, and remand to the Eleventh Circuit for further proceedings in light of this Court's intervening decision in *Rompilla*.

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[9] *See Elledge v. Dugger*, 823 F.2d 1439, 1445 (11th Cir.), *vacated in part on other grounds*, 833 F.2d 250 (11th Cir. 1987) (counsel deficient where he "'presented a psychiatric defense without a psychiatrist,' relying instead solely on [defendant's] 'free-form' testimony about his background and mental impairments") (citation omitted); *Stephens v. Kemp*, 846 F.2d 642, 655 (11th Cir. 1988).

III. THE ELEVENTH CIRCUIT ERRED IN DECLINING TO GRANT A CERTIFICATE OF APPEALABILITY TO HEAR HERRING'S CLAIM THAT A PROBATION OFFICER, WITHOUT ADMINISTERING *MIRANDA* WARNINGS, HAD ELICITED INCRIMINATING AND RACIALLY INFLAMMATORY STATEMENTS IN A PRE-TRIAL INTERVIEW

At the penalty phase of Herring's trial, the trial judge, over Herring's counsel's objections, permitted Mary White, a probation/parole officer, to testify to statements Herring made to her during a custodial interrogation. (Vol. 7 at 777-78.) Herring had told her that the 7-Eleven clerk "got what he deserved" and that his death meant "one less cracker." Prior to trial, the State improperly withheld all evidence of this interrogation, including the substance of the incriminating statement made by Herring. (*Id.* at 757-59.) Even as late as the commencement of the sentencing proceeding, the prosecutor's proffer of White's testimony deliberately avoided mention of any racially inflammatory statements:

> The summary of her testimony would be that she had conversations with the Defendant. The Defendant made certain statements to her regarding the crime in question. Evidence and the lack of. And more specifically . . . that the victim got what he deserved. If the guy hadn't played hero, he would not have gotten shot. And too, the Defendant's feeling regarding that incident.

Id. at 757-58.

The Florida Supreme Court affirmed the admissibility of this testimony, finding Herring had waived his rights under

Miranda at the time of his initial arrest. *See Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988). That court's summary disposition of this issue hinged upon two critical factual findings: (i) that Mary White's custodial interrogation of Herring occurred in the same place where Herring had originally been given *Miranda* warnings, and (ii) that White's interrogation of Herring was reasonably contemporaneous with the *Miranda* warnings that Herring was reportedly given. *See id.* There is no record support for either finding. White's interrogation of Herring could have occurred as long as seventeen days after Herring's removal from the Daytona Beach Police Station, where the record reflects he was last given *Miranda* warnings.[10] (Vol. 7 at 777.) The State even conceded at oral argument before the Florida Supreme Court that it had no idea when Herring's interrogation occurred. (A-37-39.)

The Eleventh Circuit misread the record and conducted an unreasonable application of clearly established Supreme Court precedent in declining to grant a certificate of appealability on the claims arising from the introduction of White's testimony. "To obtain a COA under sec. 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that [ ] includes showing that reasonable jurists could debate whether (or for that matter, agree that) the petition

[10] Herring was arrested on June 12, 1981 and brought to the Daytona Beach police station, where he was given *Miranda* warnings. After his confession, he was taken from the police station to the Volusia County Jail, where he remained in custody continuously until he was indicted on July 1, 1981. Officer White testified only that she interrogated Herring at the Volusia County Jail in June 1981. That interrogation could have occurred at any time until just prior to Herring's indictment.

should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Because the Florida state courts' rulings constituted an unreasonable application of *Estelle v. Smith*, 451 U.S. 454 (1981), and *Miranda v. Arizona*, 384 U.S. 436 (1966), Herring has more than met those requirements.

Officer White's interrogation of Herring is analytically indistinguishable from the examination of the accused by a psychiatrist in *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, this Court held that a psychiatrist's testimony at the sentencing phase of a defendant's capital murder trial violated the Fifth Amendment because the defendant had not been given *Miranda* warnings prior to the psychiatric examination and that the defendant had been denied the right to the effective representation of counsel. *Id.* at 464, 470-71. Here, the facts are even more compelling because Herring was questioned by an officer of the State rather than a psychiatrist.

The federal district court erred in concluding that this claim was procedurally barred. The Florida Supreme Court addressed this issue on the merits, *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988), and did not base its judgment on procedural grounds. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Thomas v. Harrelson*, 942 F.2d 1530, 1531-32 (11th Cir. 1991).

Further, the surprise use of White's testimony violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. White had not been identified as a witness prior to trial; nor was Herring's counsel advised of the substance of her statement. Under Florida law at the time of Herring's trial, the State's failure to meet its obligations under Rule 3.220 of the Florida Rules of Criminal Procedure required *per se*

reversal of Herring's death sentence, unless the trial judge conducted a full scale hearing to ascertain the extent to which Herring was prejudiced by the State's violation. No hearing was held. *Tarrant v. State*, 668 So. 2d 223, 225-26 (Fla. Dist. Ct. App. 1996). This Court has held that where a trial court's evidence ruling renders a State criminal proceeding fundamentally unfair, the petitioner is entitled to relief. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

The use of White's testimony injected racial bias into the sentencing proceeding. This Court has long held that claims of racial bias in a capital sentencing proceeding must be subjected to a high degree of scrutiny. *Turner v. Murray*, 476 U.S. 28, 35 (1986). The force of White's testimony cannot be overstated. Herring is black. The victim was white. All of the members of the jury were white. Apart from proving a prior robbery conviction, the State's case at the sentencing phase consisted exclusively of White's testimony. (Vol. 7 at 803.) The testimony tainted the entire proceeding. The State did not offer White's testimony to demonstrate that racial hatred was the motive for the crime, or for any other relevant purpose.[11]

The record thus establishes, at the very least, a *prima facie* case of racial discrimination in Herring's sentencing in violation of the Equal Protection Clause. Once the defendant establishes a *prima facie* case of purposeful discrimination, the burden then shifts to the prosecution to rebut that case. *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986); *Alexander v. Louisiana*, 405 U.S. 625, 631-32

[11] Even the trial judge, in denying Herring's motion pursuant to Florida R. Civ. P. 3.850, concluded that White's testimony was irrelevant to the aggravators applicable to Herring's case. *State v. Herring*, No. 81-1957-CC, slip op. at 4 (Fla. Cir. Ct. July 25, 1985) (A-83, ¶D).

(1972); *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). The prosecution never was required to meet that burden.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Court (a) grant certiorari review; (b) summarily reverse pursuant to *Clemons* and *Sochor*; or (c) vacate and remand in light of *Miller-El* and *Rompilla*.

Respectfully submitted,

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APPENDIX

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Due Process Clause of Section 1 are set out in this volume and the preceding volume. See the volume containing Amendments 7 to 14 for materials pertaining to the Citizenship and Privileges and Immunities Clauses of that section and the volume containing the end of the Constitution for materials pertaining to the Equal Protection Clause of that section and sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way

abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

IN THE
CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

TED HERRING,

Defendant.

CASE NO.: 81-1957-CC
COUNT I

JUDGMENT AND SENTENCE

YOU, TED HERRING, being now before the Court attended by your attorneys, HOWARD PEARL and J. PEYTON QUARLES, and having had a fair trial by the jury of your countrymen and having been found Guilty of the crime of Murder in the First Degree, with a recommendation of death by the jury in a separate proceedings to consider the penalty, the Court now adjudges you to be Guilty of that offense. What have you to say why the sentence of the law should not be pronounced upon you? Saying nothing, it is the sentence of the law and such is the Judgment of the Court that you, TED HERRING, be delivered by the Sheriff of Volusia County, Florida, with a copy

of this sentence forthwith, to the proper office of the Department of Corrections, and by him safely kept until by warrant of the Governor of the State of Florida, you, TED HERRING, be electrocuted until you are dead. May God have mercy on your soul.

DONE AND ORDERED in Open Court at Daytona Beach, Volusia County, Florida, this 1st day of March, 1982.

/s/ SJF

S. JAMES FOXMAN, CIRCUIT JUDGE

This sentence shall run consecutive ~~to Count II hereof and~~ to sentence imposed by this Court in Case No. 81-1749-CC.

IN THE
CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 81-1957-CC

STATE OF FLORIDA,

vs.

TED HERRING,

Defendant.

Filed in open Court
Seventh Judicial Circuit,
Volusia County, Florida

MAR 1, 1982

V.Y. SMITH, CLERK
By /s/ B.R. [illegible]
Deputy Clerk

FINDINGS PURSUANT TO F.S. 921.141

I. On February 25, 1982 at Daytona Beach, Florida, the jury returned a verdict of guilty as to Murder in the First Degree and Robbery With a Firearm. On February 26, 1982 the jury returned an advisory opinion recommending imposition of the death penalty. The Defendant was sen-

tenced to death by electrocution by this Court on March 1, 1982, and their findings are filed concurrent with sentencing. While these findings concern the application of the death penalty the Court does note with regard to the robbery sentence that there was abundant evidence to support a finding of premeditated murder. It is not a situation where there was only evidence to support felony murder (see *Mahaun vs. State*, 377 So.2nd 1158 (Fla. 1979) and *Hillery vs. State*, 391 So.2nd 777 (4th DCA 1980).

II. *Aggravating circumstances* (must be established beyond a reasonable doubt)

1. *The crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment.* The evidence does not establish this circumstance.

2. *The Defendant has been previously convicted of another capital offense or of a felony involving the use of threat of violence to some person.* As conceded by the defense the Defendant was convicted and sentenced by this Court in January of 1982 for an unrelated robbery with a firearm. This factor is established.

3. *The Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.* There is no evidence to support this circumstance.

4. *The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.* As conceded by the defense the murder was committed by the Defendant during the course of a robbery. This factor is established.

5. *The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.* The Court accepts Detective Varner's testimony wherein the Defendant said he fired the second shot into Norman Dale Hoeltzel because he was still alive and the Defendant did not want a witness to his crime. By his own admission the Defendant clearly established this circumstance. The case of *Riley vs. State*, 366 So.2nd 19 (Fla. 1979) supports the proposition that this circumstance applies to the elimination of witnesses to a crime as well as law enforcement officers.

6. *The crime for which the Defendant is to be sentenced was committed for financial gain.* While the facts of the case fit this circumstance it cannot be counted because this Court already has counted as an aggravating circumstance the fact that the crime was committed during the felony of robbery.

7. *The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws.* The evidence does not establish this circumstance.

8. *The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.* This circumstance comes close to being established. The Defendant gave no indication of any remorse during the trial. In fact, probation officer Mary White testified Defendant stated the death of Norman Dale Hoeltzel meant "one less cracker." Lack of remorse can be considered in determining this criteria (*Sireci vs. State*, 399 So.2nd 964 (Fla.

1981). Still this Court believes however brutal and senseless this crime is, it does not meet this extreme criteria.

9. *The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.* Norman Dale Hoeltzel was shot in the side of the head at close range. The bullet first passed through his hand. While he lay on the floor wounded, but still alive, the Defendant shot him again in the neck to eliminate any possible witness. The victim was killed because he may have been a possible witness to the robbery. There is no evidence Norman Dale Hoeltzel and the Defendant knew one another or had any contact prior to the shooting. There is only some slight evidence Norman Dale Hoeltzel was making a move towards the armed Defendant. There certainly was no affray. This Court finds beyond a reasonable doubt that this murder was cold, calculated, and premeditated; and without any pretense of moral or legal justification. This circumstance is established.

III. Mitigating circumstances (do not have to be established beyond a reasonable doubt)

1. *Defendant has no prior significant history of prior criminal activity.* Pursuant to *Maggard vs. State*, 399 So.2nd 973 (Fla. 1981) the defense conceded this mitigating circumstance did not exist; and the Court prohibited the State from playing the full confession tape which would have disclosed the Defendant's participation in several convenience store robberies. This mitigating circumstance does not exist (with the exception of the one convenience store robbery for which the Defendant was previously tried and convicted, this Court did not take into

consideration the three convenience store robberies now pending before this Court.)

2. *The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.* The evidence does not establish this circumstance.

3. *The victim was a participant in the Defendant's conduct or consented to the act.* The evidence does not establish this circumstance.

4. *The Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and Defendant's participation was relatively minor.* The evidence does not establish this circumstance.

5. *The Defendant acted under extreme duress or under the substantial domination of another person.* The evidence does not establish this circumstance.

6. *The capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired.* There was no evidence indicating Defendant was intoxicated or was operating with reduced capacity to appreciate the criminality of his conduct on May 29, 1981. In fact, the evidence strongly indicates the murder was coldly calculated to eliminate a witness. The Defendant's mother did indicate the Defendant had learning disability, was hyperactive, and had a low IQ of 80. But this Court had ample opportunity to closely observe the Defendant. He is alert, responsive, and reasonably articulate. At worst, he is of slightly below average intelligence. This mitigating factor is not established by the evidence.

7. *The age of the Defendant at the time of the crime.* The State and the defense indicate the Defendant was 19 at the age of the crime. Although the Florida Supreme Court has said there is no per se rule pinpointing a particular age as an automatic mitigation factor (*Perry vs. State*, 395 So.2nd 170 (Fla. 1981)), nineteen seems to be right at the pivot point. The Defendant in *Perry* was 20, and yet that age was not counted as a mitigating circumstance under the facts of that case. In this case age does not seem to be a factor. After observing the Defendant closely over a period of time the Court believes the Defendant would continue the same course of criminal conduct at age 20, and beyond. Nonetheless, the Court feels the Defendant should be given the benefit of the doubt as to this mitigating factor. This mitigating factor is established but it is not a strong mitigating factor.

8. *Any other aspect of the Defendant's character or record and any other circumstance of the of the offense.* The Court accepts as a mitigating circumstance the fact that as Defendant had a difficult childhood (see *Neary vs. State*, 384 So.2nd 881 (Fla. 1980)). His mother indicated the Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble in school.

SUMMARY

The Court finds four (4) aggravating circumstances exist; only two (2) mitigating factors have been established. This Court is aware however that the Court should go beyond mere mechanical tabulation (*Brown vs. State*, 381 So.2nd 690 (Fla. 1980)). In this case, not only do the established aggravating factors numerically outweight

the mitigating factors, but the aggravating factors are stronger and carry more weight and relevency than the mitigating factors. The Defendant's age and difficult childhood are not sufficient mitigating factors to block imposition of the death penalty in a case where a Defendant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him. Further, this Court must also give due weight to the jury's recommendation of death. After having carefully reviewed all evidence in this case and carefully reviewing the evidence in mitigation and aggravation, the Court finds imposition of the death penalty is warranted.

/s/ SJF

S. JAMES FOXMAN, CIRCUIT JUDGE
March 1, 1982

COPIES TO: Gayle Graziano, Assistant State Attorney
J. Peyton Quarles, Assistant Public Defender

A-15

SUPREME COURT OF FLORIDA

No. 61994
February 2, 1984
Rehearing Denied April 11, 1984

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., of armed robbery and first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that: (1) prospective juror, who stated he would have difficulty rendering a verdict of guilty if he knew death penalty was a possibility and who stated unequivocally that he knew of no circumstance whatsoever in which he would be able to recommend death penalty, was properly discharged for cause; (2) trial judge correctly excluded, during sentencing phase, proffered testimony concerning sentences imposed in unrelated capital cases; (3) trial judge correctly excluded from jury during sentencing phase of trial certain poems written by defendant which were offered as mitigating evidence; (4) evidence was sufficient to establish aggravating circumstance that murder was committed for purpose of avoiding or preventing lawful arrest; (5) evidence was sufficient to sup-

port finding of aggravating circumstance that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification; (6) aggravating circumstances outweighed mitigating circumstances; and (7) imposition of death penalty was proportionately correct.

Affirmed.

Ehrlich, J., filed opinion concurring in part and dissenting in part.

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Mark C. Menser, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

The appellant, Ted Herring, was convicted of armed robbery and the first-degree murder of a convenience store clerk. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence. We have jurisdiction,[1] and affirm the conviction and sentence of death.

The following are the relevant facts. Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the

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[1] Art. V, § 3(b)(1), Fla. Const.

crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his *Miranda* rights. Herring signed a written waiver of his *Miranda* rights and was interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie

on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's.

At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder.

She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating and two mitigating circumstances. The aggravating circumstances found by the trial judge were: (1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge

found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Guilt Phase

The appellant's only contention of error with regard to the guilt phase of his trial is that the trial judge erred in excusing one of the prospective jurors for cause. Appellant asserts that he is entitled to a new trial because, in excusing this juror, the trial judge incorrectly applied the test for excusing death-scrupled jurors set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We disagree.

The prospective juror, during the course of the *voir dire* examination, stated that he was opposed to the imposition of the death penalty under any circumstances, and that although he could possibly change his mind, at the moment he did not know of any circumstance which would cause him to change his mind. The prospective juror's specific responses to inquiry by the court and counsel were as follows:

> THE COURT: Well, you're sort of straddling a fence and you need to sort of help me out here. There's nothing wrong or right with your views. It's just we need to know where you stand; and my question to you again is, would your objections, reservations or doubts about the death penalty interfere with your ability in the first phase to objectively determine guilt or innocence?
>
> MR. CAMERON: No.

THE COURT: All right.

MR. CAMERON: It would not.

THE COURT: Okay. Now, the second question: *If the Defendant was proven guilty beyond every reasonable doubt, could you return a verdict of guilty knowing that the death penalty was a possibility?*

MR. CAMERON: *Right now I think I could not.* I might change my mind in the middle of the trial. It's a possibility.

THE COURT: *Okay. You feel that you would refuse to impose the death penalty under any circumstance?*

MR. CAMERON: *I feel that way now.*

THE COURT: Okay.

Counsel, I'm going to open it up to question by the State and the Defense.

Ma'am?

MS. GRAZIANO: Mr. Cameron, just to make sure I understand you correctly, *the way you feel right now, there are no circumstances whatsoever that you would be able to recommend the death penalty?*

MR. CAMERON: *That's true.*

MS. GRAZIANO: I have no further questions.

MR. PEARL: Mr. Cameron, I'm Howard Pearl from the Public Defender's office. I'd like to put to you a question or give you an example which is admittedly extreme because what we're asking you about is, are there any circumstances under which you might vote in favor of the death penalty; and, let me give you an extreme example.

Imagine, if you will, that the Defendant on trial for murder were Adolph Hitler or Idi Amin who caused the cold-blooded murder and death of millions of people. If that were true and if either one of these people were found guilty of murder in the first degree, would you consider the death penalty?

MR. CAMERON: I would consider it, but I think I'd find alternatives that I would choose.

MR. PEARL: Well, you cannot choose alternatives except for two, as the Judge has instructed you. There are only two in the event of a conviction of first degree murder. One is life in prison with a minimum of 25 years before parole, and the other is death. There are no other alternatives. There are no social engineering things that you can apply. There's no way you can change the person involved, in that sense. So, all you can do is choose one of those two alternatives as a juror, and you have said that you would follow the law.

MR. CAMERON: Uh-huh.

MR. PEARL: And, therefore, I ask you under such an extreme circumstance where the person that you had on trial who was convicted of first degree murder was a person of the caliber I have named, could you then, knowing your alternatives and not being able to choose others, vote for the death penalty?

MR. CAMERON: Under emotional influence I might.

MR. PEARL: Once again, I have to clear this up for you.

Serving on a jury is not supposed to be an emotional experience. You're supposed to bring to it your common sense, your logic, your everyday business sense; and you're supposed to leave emotion aside.

MR. CAMERON: If I was able to talk and think logically, I probably would not. I'm sure I would not.

MR. PEARL: Well, could you?

MR. CAMERON: I mean, *I'm sure I would not recommend the death penalty.*

MR. PEARL: Well, you would be amongst eleven other jurors. You would be one of twelve.

MR. CAMERON: Yes.

MR. PEARL: On the one hand, would you exercise independent judgment in your thinking?

MR. CAMERON: Yes.

MR. PEARL: And, on the other, would you listen to the views and respect the views of your fellow jurors in arriving at your verdict and discuss the case?

MR. CAMERON: I would listen, yes.

MR. PEARL: Would you be receptive to logical argument with respect to the death penalty if you were to hear such logical argument and respond to it and perhaps be able to then vote in favor of it if you felt that the argument was compelling?

MR. CAMERON: I would listen to it. I would not anticipate that I would change my mind.

MR. PEARL: Well, then I think—correct me if I'm wrong—I think what you have said is, although you're opposed to it and although you're thinking now is that you would not vote for the death penalty, that, on the other hand, there are or may be circumstances under which you would, although you do not know what those circumstances might be at the present time?

MR. CAMERON: It's a possibility I could change my mind. That's true.

MR. PEARL: Thank you, sir.

THE COURT: All right, Counsel. Is there a motion?

MS. GRAZIANO: The State moves that Mr. Cameron be stricken for cause.

MR. PEARL: I oppose it, Your Honor. I believe that Mr. Cameron could—is qualified to consider the death penalty and to make a decision at the proper time.

(Emphasis added.)

As noted, at the beginning of the inquiry the prospective juror stated that, with his present feelings, if he knew the death penalty was a possibility he would have difficulty rendering a verdict of guilty. The juror unequivocally stated that he knew of no circumstance whatsoever in which he would be able to recommend the death penalty. When pressed by appellant's counsel concerning the alternatives of either a life or death sentence, and given the examples of Adolph Hitler and Idi Amin, the prospective juror responded that he might recommend the imposition of the death penalty "under emotional influence." When reminded by counsel for the appellant that he must "leave

emotion aside," the prospective juror stated, "I'm sure I would not recommend the death penalty."

In footnote 21 of *Witherspoon*, the United States Supreme Court set forth a test for determining when the state may excuse a prospective juror for cause in a death penalty case.[2] *Witherspoon* requires a trial court to deter-

[2] Footnote 21 reads as follows:

> 21. Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. *See* nn. 5 and 9, *supra*.
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case.

391 U.S. at 522-23, 88 S.Ct. at 1777.

mine whether or not a prospective juror is "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances. . . ." 391 U.S. at 522 n. 21, 88 S.Ct. at 1777. The United States Supreme Court reaffirmed this principle in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), where it concluded that a prospective juror may be excused for cause when his answers reveal a view toward capital punishment which would "substantially impair the performance of his duties as a juror" in the penalty phase of the trial. *Id.* at 45, 100 S.Ct. at 2526.

This Court is familiar with the Eleventh Circuit Court of Appeals' recent interpretation of *Witherspoon* and *Adams* in *Witt v. Wainwright*, 714 F.2d 1069 (11th Cir.1983), which held that *Witherspoon* and *Adams* did not allow a juror to be excused for cause where the juror responded that she did not "think" that she could put aside her feelings and be an impartial juror where the death penalty was involved. Without accepting the Eleventh Circuit's construction of *Witherspoon* and *Adams*, we find that in the instant case the prospective juror did more than "think" that his views would interfere with the performance of his duty as a juror. We conclude that the prospective juror in the instant case was properly discharged for cause because the record clearly reflects that, at the time of the inquiry, the juror's views would "substantially impair the performance of his duties as a juror," *Adams*, in the penalty phase of the trial and would also affect him in making a decision in the guilt phase of the trial.

It would make a mockery of the jury selection process to rule otherwise for it would allow persons with fixed opinions to sit on juries. To permit a person to sit as a juror after he has honestly advised the court that he does not

believe he can set aside his opinion is unfair to the other jurors who are willing to maintain open minds and make their decision based solely upon the testimony, the evidence, and the law presented to them.

Although appellant has raised no other issues with respect to the guilt phase of his trial, we have reviewed the record in this case and find that there is substantial competent evidence to support the appellant's conviction. From our examination of the record, we find no reversible errors in the guilt phase of appellant's trial.

Sentencing Phase

Herring contends that his sentence should be vacated and a new sentencing trial granted because (1) the trial court refused to allow testimony by attorneys who represented other murder defendants in similar cases who were able to obtain life sentences; (2) the trial court improperly excluded two poems written by appellant which were offered in mitigation; (3) the trial court erred in finding as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the trial court erred in finding the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner; (5) the trial court improperly used the aggravating circumstance that the murder was committed during the commission of a felony when that felony formed the underlying basis for the felony-murder conviction; and (6) Florida's capital sentencing statute is unconstitutional on its face and as applied in this case.

Appellant's points five and six merit no discussion. Both points have been considered and rejected by this Court in

prior cases. *See Menendez v. State*, 419 So.2d 312 (Fla.1982); *Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

As to his first contention, appellant argues that under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the trial judge should have allowed defense counsel for other first-degree murder defendants to testify that their clients received life sentences for similar crimes. The testimony sought to be presented reflects that these defendants were able to plead guilty and receive a life or lesser sentence. We have previously held that evidence concerning sentences imposed upon codefendants must be admitted in the penalty phase in order to allow the jury to know all the facts and circumstances surrounding an offense and its participants. *See Downs v. State*, 386 So.2d 788 (Fla.), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 238 (1980); *Salvatore v. State*, 366 So.2d 745 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Smith v. State*, 365 So.2d 704 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Messer v. State*, 330 So.2d 137 (Fla.1976), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982). These cases do not hold, however, that the circumstances and sentences in other death penalty cases must be admitted in the sentencing phase of the trial. Evaluating the sentences of other defendants in unrelated crimes involves a number of variables. There is no requirement in *Lockett* for the admission of such evidence in the sentencing phase. What *Lockett* does require is the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue. 438 U.S. at 604-605 n. 12.

The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant. The trial court, in determining the sentence to impose, must use its judicial experience in evaluating and weighing the aggravating and mitigating circumstances with the recommendation of the jury. The use of sentences imposed on other defendants relates to the proportionality of the sentence and is an appropriate element to be considered by the trial judge in imposing sentence upon the defendant, but is not a matter for the jury. This Court also has the responsibility to determine whether the sentence is proportionate with other death penalty cases. In the instant case the trial judge correctly excluded from the jury the proffered testimony concerning sentences imposed in unrelated capital cases.

Appellant's second claim is that the trial judge improperly excluded certain poems written by the appellant which were offered as mitigating evidence. These poems were contained in a clinical report about the appellant. The record reflects that appellant's counsel attempted to read the poems into evidence without identifying the report or offering it into evidence or calling the person who wrote it to testify. Under these circumstances, we find that the trial judge correctly excluded these poems from evidence.

Appellant's third point is that the trial court erred in finding the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The evidence in the record is uncontroverted that the appellant shot the clerk while he was standing behind the counter and shot him again after he had fallen to the floor. There was also testimony from a detective that appellant stated that he "shot a second time to prevent him

[the clerk] from being a witness against him." This evidence is, in our view, sufficient to establish the appellant's intent to kill the store clerk in order to eliminate him as a witness.

Appellant's fourth point is that the trial judge improperly found the aggravating circumstance that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness-elimination murders. We have also held, however, that this description is not intended to be all inclusive. *See Menendez; McCray v. State*, 416 So.2d 804 (Fla.1982); *Combs v. State*, 403 So.2d 418 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). In the instant case, the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined in *McCray*; *Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 1102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); and *Combs*.

The trial court did find, as mitigating circumstances in this case, that the appellant had a difficult childhood, had learning disabilities, and that he was nineteen years of age at the time of this offense. It is within the province of the trial court to decide the weight to be given particular mitigating circumstances and whether they offset the estab-

lished aggravating circumstances. As we have repeatedly stated since the initial principles for reviewing death sentences were laid down in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), Florida's death penalty statute does not comprehend the mere tabulation of aggravating and mitigating circumstances to arrive at a specific result. The aggravating and mitigating circumstances must be weighed by the trial judge in imposing the appropriate sentence. This Court must then review that sentence and consider the circumstances in the light of other decisions determining whether the death penalty is appropriate. *See Menendez.* We conclude that the established aggravating circumstances outweigh the mitigating circumstances. We have affirmed the imposition of the death sentence in cases involving similar robbery-murders where the defendants were of a youthful age and lacked prior significant criminal activity. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), and *Meeks v. State*, 339 So.2d 186 (Fla.1976), *cert. denied*, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978). The mitigating circumstances of no prior significant criminal activity is not present in this case; in fact, appellant had been previously convicted of an armed robbery. From our review, the imposition of the death penalty is proportionately correct.

For the reasons expressed, we affirm appellant's conviction and the imposition of the death sentence.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

EHRLICH, J., concurs in part and dissents in part with an opinion.

EHRLICH, *Justice*, concurring in part and dissenting in part.

I concur in both the conviction and the sentence. I do not, however, agree that the record supports a finding of heightened premeditation sufficient to characterize the murder as cold, calculated and premeditated. The majority relies on the second shot, fired after the clerk was on the floor, as evidence of the heightened premeditation. But the record clearly shows the shot was fired within the same time-frame as the first. While I agree that more than enough time elapsed to allow for premeditation, I cannot agree that appellant had sufficient time for cold calculation. We have, since *McCray* and *Combs*, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.145(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, *as applied*, of Florida's death penalty statute.

SUPREME COURT OF FLORIDA

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 67524.
Dec. 30, 1986.
Rehearing Denied March 2, 1987.

Defendant, who had been convicted and sentenced to death for robbing and killing convenience store clerk, moved for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied the motion. Defendant appealed. The Supreme Court held that: (1) defendant's arguments were not proper for postconviction relief motion, and (2) death sentence was proportionate to crime.

Affirmed.

Jeremy G. Epstein, Dennis P. Orr, Kenneth A. Freeling and James P. Bodovitz of Shearman & Sterling, New York City, for appellant.

Jim Smith, Atty. Gen., and Ellen D. Phillips, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals a trial court's denial of his motion for post-conviction relief without an evidentiary hearing under the provisions of Florida Rule of Criminal Procedure 3.850. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm.

Herring was convicted and sentenced to death for robbing and killing a convenience store clerk. The evidence reflected that Herring shot the clerk once when he perceived a threatening move, and then shot the clerk again "when he hit the ground." This Court affirmed Herring's conviction and sentence in *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Herring raises the following multiple issues that could have been raised on appeal: (1) the trial court erroneously applied two statutory aggravating circumstances; (2) the trial court impermissibly counted both the cold, calculated, and premeditated and the elimination of witness aggravating circumstances; (3) the trial judge applied a nonstatutory aggravating factor in sentencing Herring to death; (4) Herring's probation officer should not have been allowed to testify concerning Herring's comment about the victim; (5) the death penalty jury instructions were constitutionally inadequate; (6) the trial judge failed to consider the death sentence's proportionality; (7) the trial court erroneously excluded Herring's proffered mitigating evidence; (8) the trial court applied an incorrect sentencing standard; (9) during the sentencing phase closing arguments, the prosecutor improperly suggested that Herring might be granted parole if given life imprisonment; (10) excluding a prospective juror for cause because of his death penalty

views violated the sixth and fourteenth amendments; (11) the state did not prove Herring knowingly and intelligently waived his privilege against self-incrimination and his right to appeal; and, finally, (12) the trial judge erred by abandoning his duty to review the jury's recommended sentence. We reject all these contentions as improper for a 3.850 motion. As we have previously stated, a 3.850 motion cannot be utilized for a second appeal to consider issues that either were raised or could have been raised in the initial appeal. *Sireci v. State*, 469 So.2d 119 (Fla.1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986); *Jones v. State*, 446 So.2d 1059 (Fla.1984); *Demps v. State*, 416 So.2d 808 (Fla.1982).

Appellant next claims that his sentence is not proportionate, and that *Caruthers v. State*, 465 So.2d 496 (Fla.1985), decided after we affirmed the initial appeal in this case, mandates a life sentence. The state responds that a prior case is not reviewable in light of a subsequent decision, citing *Tafero v. State*, 459 So.2d 1034 (Fla.1984), and *Sullivan v. State*, 441 So.2d 609 (Fla.1983). We do not reach that issue because there are clear distinguishing characteristics between Caruthers and Herring. Caruthers had no significant history of prior criminal activity, and the sentencing proceeding considered other nonstatutory mitigating factors. Herring, however, had a prior robbery conviction. Additionally, there was evidence that Herring killed the victim to eliminate him as a witness. We hold that Herring's contention on this issue is without merit.

In his next point, Herring contends that an evidentiary hearing was necessary to decide his ineffective-assistance-of-counsel claims. The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla.1981). We agree with the trial judge's findings and commend him for his detailed explanation.

Finally, we reject Herring's claim that our capital sentencing statute is discriminatorily applied. We have rejected this claim in multiple decisions. *Smith v. State*, 457 So.2d 1380 (Fla.1984); *Adams v. State*, 449 So.2d 819 (Fla.1984).

For the reasons expressed, we affirm the trial court's denial of relief.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur.

501 So.2d 1279, 12 Fla. L. Weekly 44

APPEAL
(Tape Transcription)

DONALD DEPEW, RPR, CRR
Court Reporter

INTERIM COURT REPORTING
545 Fifth Avenue
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New York, New York 10017
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JUDGE FOUR: You're assuming that in fact, that he made this statement?

MS. PHILIPS: Yes, I am.

JUDGE FOUR: Well, let me ask you this question: Can you tell us the circumstances under which this statement was made?

MS. PHILIPS: I can tell you what the record reveals. And that's a crucial point here, because we have to keep in mind we're dealing with what appellate counsel should have raised.

JUDGE FOUR: What does the record reveal as to how—

MS. PHILIPS: The record—

JUDGE FOUR: —this statement was made?

MS. PHILIPS: The record reveals that sometime in June of 1981 the defendant had a conversation in the jail with a PTI officer, a pretrial intervention officer.

The record reveals that on June 12th, on June 12th, 1981, he confessed and was in cud—and taken into custody. Now, that statement could either have been made prior to June 12th or after June 12th. He was indicted—the indictment issued on January—on July 1st.

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So it's either in June subsequent to June 12th, or in June prior to June 12th. If it's prior to June 12th, I don't know if he was in custody, there's no reason to assume so.

And to answer, I guess it was Justice McDonald's question: No, there is no Miranda warning. If he's not in custody, there's no Miranda warning necessary from a probation officer, and that would be Minnesota versus Murphy, a United States Supreme Court case.

So assuming that he was in jail—

JUDGE FOUR: And you're not saying that he's in custody?

MS. PHILIPS: I know that the statement was made during June. I know that he—it could either be made in June before he was in custody or after he was in custody. Before he was in custody, it doesn't—there's no Miranda rights.

JUDGE FOUR: But it was made in jail, wasn't it?

MS. PHILIPS: Okay, let's say it was made in jail. The point I was trying to make there—and I did make an error in the record, and that was because the word processor ate my

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answer. And I had to re-enter it right away. And I did make that change right at the last minute, I guess, overemphasizing my own thinking. And I apologize to the Court.

He was in jail—he was in the jail at the time he made that statement. I didn't know if he was on probation. If he met his probation officer in the jail and he made that statement, he's still not in custody.

I don't know when it was made. It was made in June. It was made up to the 12th. Minnesota versus Murphy indicates there's no need for Miranda rights.

If it was made after the 12th—

JUDGE FOUR: Let me—

As a matter of policy, even policy of the United States Supreme Court, this was a probation officer. The probation officer got this particular statement, furnished this statement to the Court.

Doesn't the United States Supreme Court, under Gardner, require that that information be given to the defendant in order to give him an opportunity to rebut it at sentencing?

MS. PHILIPS: Yes, he was given an

SUPREME COURT OF FLORIDA

TED HERRING,

Petitioner,

v.

RICHARD DUGGER,

Respondent.

No. 70185.
June 23, 1988.
Rehearing Denied Aug. 25, 1988.

Petitioner, having been convicted of first-degree murder and sentenced to death, sought writ of habeas corpus, alleging ineffective assistance of appellate counsel. The Supreme Court held that: (1) appellate counsel was not ineffective for failing to address admissibility of statements made by petitioner to probation officer, and (2) appellate counsel was not ineffective for failing to convince, on direct appeal, more justices on Supreme Court that cold and calculating was inappropriate aggravating circumstance.

Writ denied.

Barkett, J., concurred in result only.

Jeremy G. Epstein, Dennis P. Orr, Kenneth A. Freeling, James P. Bodovitz and David Sorokoff of Shearman & Sterling, New York City, for petitioner.

Robert A. Butterworth, Atty. Gen. and Ellen D. Phillips, Asst. Atty. Gen., Daytona Beach, for respondent.

PER CURIAM.

Ted Herring petitions this Court for a writ of habeas corpus, seeking vacation of his first-degree murder conviction and death sentence on the principal grounds of ineffective assistance of appellate counsel. We have jurisdiction. Art. V, § 3(b)(7), (9), Fla. Const. We deny the writ.

Herring was convicted of armed robbery and first-degree murder, and the trial judge, in accordance with the jury recommendation, imposed the death sentence. This Court affirmed that conviction and sentence in *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). Subsequently, Herring brought postconviction relief proceedings under Florida Rule of Criminal Procedure 3.850, and we affirmed the trial court's denial of relief. *See Herring v. State*, 501 So.2d 1279 (Fla.1986).

Herring, by this habeas corpus petition, seeks vacation of the conviction and sentence or, in the alternative, requests a life sentence, a new sentencing hearing, or a new appellate review of the sentencing proceedings. He claims that appellate counsel was ineffective in failing to either raise or adequately address the following nine issues: (1) the admission in the trial's penalty phase of statements Herring made to a probation officer while in custody; (2) the admission of Herring's confession; (3) the improper use by the trial court of two aggravating circumstances because

they were based on one aspect of the crime; (4) the jury instructions were constitutionally inadequate; (5) the trial court improperly applied a nonstatutory aggravating circumstance; (6) a juror was improperly excused under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (7) the cold, calculated, and premeditated aggravating circumstance does not apply; (8) the elimination-of-a-witness aggravating circumstance does not apply; and (9) counsel failed to file supplemental authority on a significant point of law.

We find that only points (1) and (7) warrant discussion; the remaining points are without merit.

Ineffectiveness of Counsel for Failure to Challenge Admissibility of Statements Made to a Probation Officer

Under this claim, Herring asserts that his appellate counsel was ineffective for failing to address the admissibility of statements made by Herring to a probation officer. Herring was initially arrested for possession of a stolen car at approximately 11:30 a.m. on June 12, 1981. The arresting officer advised Herring that he had the right to remain silent and to have an attorney. Herring was immediately transported to the Volusia County jail, where he was questioned and advised of his *Miranda** rights. Herring then executed a written waiver of his rights. Herring did not become a suspect in the homicide until his appearance in a police lineup later that afternoon. Questioning regarding the homicide lasted several hours, during which time he confessed to the homicide. While Herring was in custody, he was repeatedly advised of his rights.

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* *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Herring's confession was taped and played to the jury and, in pertinent part, reads as follows:

> DETECTIVE WHITE: This will be a continuation into this interview. Subject, Ted Herring has . . . two additional comments which he wishes to make to us at this time. The time is now 7:50 p.m. Present in the room [are] Detective Varner, Detective Anderson, Detective White, speaking, and black male, Ted Herring. Mr. Herring, in the last hour or so you apparently have had a change of heart in relation to the offense at the 7-11 on 5/29/81 at 205 South Ridgewood Avenue and you want to make some more comments about that. Can you go ahead and tell us, in your own words, more about what happened . . . that morning.
> HERRING: Yes, I do. When I went into the 7-11 store that morning, and it was closed and I came back, I went into the store and asked for a pack of cigarettes. He put the cigarettes up on the counter and I asked him for the money. He put, he gave me the money, right, and . . .
> WHITE: Do you want to go ahead and talk to us about it, Ted?
> HERRING: Yeah. What it all boils down to, I shot him.
> WHITE: Okay. How about telling us like you told . . .
> HERRING: Yeah. Well, I, when I asked for the pack of cigarettes, he told me they was over there in the corner. When I went to turn my head a little bit, I turned back and it looked like he was

coming across the counter and I put the gun up to his head and he put his hand up and I shot him.
WHITE: As he put his, which hand up?
HERRING: He put, I think it was his right, his right hand up, and I shot him. But it was by mistake, I didn't mean to shoot him.
WHITE: Where did you shoot him at that time, Ted?
HERRING: In the head.
WHITE: Did you shoot him again?
HERRING: Yeah. Yes, I did, out of fear I did.
WHITE: Did you shoot him once he was down on the ground?
HERRING: Yeah, when he hit the ground I shot him.
WHITE: Where did you shoot him that time?
HERRING: In the head.
WHITE: What did you use?
HERRING: .22 snubnose.
WHITE: Okay. Before I go any further with this, has, has anyone threatened or coerced you to make these statements to us?
HERRING: No, they haven't.
WHITE: You made them of your own free will and volition?
HERRING: My own free will.

After Herring had been taken into custody and signed the *Miranda* rights waiver, but while he was still in the county jail, Herring spoke to a probation officer. During the penalty phase, over defense counsel's objection, the probation officer testified that she talked with Herring regarding "the murder of one Dale Hoeltzel at 205 South Ridgewood, Daytona Beach, Florida." She stated, "[Her-

ring] indicated to me that the young man got what he deserved due to the fact that, him trying to play hero. And that it was just one less cracker."

Controlling case law establishes that a warning and waiver of rights given following the arrest for a criminal offense is sufficient to cover any later statements to a law enforcement officer concerning other criminal offenses. *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). There is no necessity to continually readvise an individual in custody as to his or her *Miranda* rights, particularly when the place of custody is the same and the time periods are not remote. *Shriner v. Wainwright*, 715 F.2d 1452 (11th Cir.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984); *United States ex rel. Henne v. Fike*, 563 F.2d 809 (7th Cir.1977), *cert. denied*, 434 U.S. 1072, 98 S.Ct. 1257, 55 L.Ed.2d 776 (1978); *Biddy v. Diamond*, 516 F.2d 118 (5th Cir.1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *Maguire v. United States*, 396 F.2d 327 (9th Cir.1968), *cert. denied*, 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed.2d 792 (1969); *Deluca v. State*, 384 So.2d 212 (Fla. 4th DCA 1980). It is not disputed that the probation officer talked to Herring concerning the homicide only after Herring had been taken into custody, *Miranda* warnings had been given, and Herring had executed a waiver of his rights. We find the statement was clearly admissible and, consequently, appellate counsel was not deficient in failing to raise this issue.

Cold and Calculating as an Aggravating Circumstance

Basically, Herring claims appellate counsel was ineffective for failing, on direct appeal, to convince more justices on this Court that cold and calculating was an inappropriate aggravating circumstance. Under the standard expressed in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the test for determining whether counsel rendered ineffective assistance is as follows: "First, the defendant must show that counsel's performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. Neither of these requirements has been established in the record. We note that appellate counsel did convince Justice Ehrlich, as reflected in the dissent, although Justice Ehrlich still concluded the death sentence was appropriate. Since our decision in *Herring*, this Court, in *Rogers v. State*, 511 So.2d 526 (Fla.1987), adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). We find that counsel's performance is not deficient simply for failing to convince enough members of this Court on direct appeal that the cold, calculating aggravating circumstance did not apply. Correspondingly, we conclude there was no ineffective assistance of counsel on the initial appeal. In view of this finding, we need not address whether *Rogers* applies retroactively.

For the reasons expressed, we deny the habeas corpus writ and affirm Herring's conviction and sentence.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

Fla., 1988.
Herring v. Dugger
528 So.2d 1176, 13 Fla. L. Weekly 407

SUPREME COURT OF FLORIDA

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 75209.
May 2, 1991.
Rehearings Denied June 12, 1991.

Motion was filed for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied motion. Movant appealed. The Supreme Court held that: (1) Supreme Court decision in *Rogers* restricting applicability of cold, calculated, and premeditated aggravating factor in death penalty cases did not entitle movant to new sentencing hearing, and (2) due process principles required evidentiary hearing on movant's claim that his public defender's service as special deputy in adjacent jurisdiction resulted in ineffective assistance of counsel.

Remanded.

Barkett and Kogan, JJ., dissented as to Part I.

McDonald, J., dissented as to Part II and filed a concurring and dissenting opinion.

Barkett, J., filed a concurring and dissenting opinion in which Kogan, J., concurred.

Jon M. Wilson of Foley & Lardner, Van Den Berg, Gay, Burke, Wilson & Arkin, Orlando, and Jeremy G. Epstein, Dennis P. Orr, David Sorokoff and Alan S. Goudiss of Shearman & Sterling, New York City, for appellant.

Robert A. Butterworth, Atty. Gen. and Barbara C. Davis, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals the trial court's denial of his motion for postconviction relief under rule 3.850, Florida Rules of Criminal Procedure. The motion sets forth two claims: (1) that our decision in *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), receding from the application of the cold, calculated, and premeditated aggravating factor, as we applied it in Herring's direct appeal,[1] requires a vacation of Herring's death sentence; and (2) that Herring's trial counsel's appointment as a special deputy sheriff resulted in ineffective assistance of counsel in Herring's trial proceeding.[2] For the reasons expressed, we affirm the denial of relief on the first claim and remand to the trial court for an evidentiary hearing on the second claim.

This case has an extensive history before this Court. In 1981, Herring was charged with the murder of a convenience store clerk. We affirmed Herring's conviction for first-degree murder and his sentence of death in *Herring v. State*, 446 So.2d 1049 (Fla.1984) [*Herring I*]. The facts are detailed in that opinion. In affirming that sentence, we held

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[1] *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

[2] We have jurisdiction. Art. V, § 3(b)(1) Fla. Const.

that the trial judge properly found four aggravating circumstances: (1) that Herring had previously been convicted of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner. In doing so, we expressly discussed the application of this last aggravating factor in that opinion. We also agreed with the trial judge that the following mitigating factors were present: (1) that Herring was nineteen years old at the time of the crime; (2) that he had a low intelligence quotient and learning disabilities; and (3) that he had had a difficult childhood.

In 1985, Herring filed a motion to vacate judgment and sentence under rule 3.850. The trial court denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla. 1986) [*Herring II*]. Subsequently, in 1987, Herring filed a petition for writ of habeas corpus, claiming that his appellate counsel rendered ineffective assistance. This Court denied relief in *Herring v. Dugger*, 528 So.2d 1176 (Fla.1988) [*Herring III*].

In 1988, Herring filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, Herring asserted that this Court's decision in *Rogers* required vacation of Herring's death sentence. Herring claimed that, since *Rogers* expressly overrules the application of the cold, calculated, and premeditated aggravating circumstance in our decision in *Herring I*, he is entitled to a new sentencing hearing. The state moved to dismiss Herring's petition because this issue had not been heard by a state court. Herring consented to the state's motion and filed the present motion

under rule 3.850, asserting that our decision in *Rogers* was a change in the law. The trial court denied the motion on this ground, holding:

> [T]his matter is procedurally defaulted in that it is untimely presented in violation of the filing deadline set forth in Florida Rule of Criminal Procedure 3.850 and constitutes an abuse of the writ. As noted by the Florida Supreme Court in *Eutzy v. State*, [541 So.2d 1143 (Fla.1989)], its decision in *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987), restricting the applicability of the cold, calculated, and premeditated aggravating factor was *not* a fundamental change in the law which "should be given retroactive effect" but was a mere "evolutionary refinement" in the law which should not be utilized to abridge the finality of judgments.

After so holding, the trial court allowed Herring to amend his 3.850 motion to assert an additional claim regarding his trial counsel's undisclosed conflict of interest. In that claim, Herring asserted that Howard Pearl, an assistant public defender of Volusia County and chief of the capital division, who had been appointed as his trial counsel, was also serving as a special deputy sheriff in Marion County while he represented Herring. Herring contends that, although Pearl had held this position for more than fifteen years, he had never disclosed this fact to Herring. Herring claims that Pearl's undisclosed conflict of interest presumptively denied him effective assistance of counsel and entitles him to a new trial. In considering this part of the motion, the trial court denied relief without an evidentiary hearing, stating:

1. The Defendant's motion relies entirely upon the same factual assertations and legal argument presented to and rejected by this court after evidentiary hearing in *State of Florida v. Roy Allen Harich*, Case Number 81-1894-BB; in fact, the Harich case as well as the appendices submitted in support of the Harich motion are incorporated by reference in this Defendant's motion. . . . [T]he Defendant's motion merely restates the factual allegations of Harich's motion (most of which have already been rejected by this court in its order denying relief in Harich's case) and no new factual allegations or legal argument are presented in support of the special deputy sheriff/ actual conflict of interest issue first raised by Harich and now regurgitated by every capital defendant who was represented by Assistant Public Defender Howard Pearl. Accordingly, for the same reasons outlined in this court's order denying relief in Harich and for the reasons outlined in the State's Rule 3.850 response, the instant motion is denied. . . .

2. The various substantial allegations of conflict of interest raised in the Harich petition and now duplicated by the defendant were rejected in Harich. This court's factual and legal conclusions in Harich necessarily control in this case especially given the lack of any additional factual allegations in support of his claim by the defendant. The issues presented having already been fully and fairly litigated in the Harich proceeding, and this court having already determined as a matter of fact and law that Howard Pearl was

not a regular deputy sheriff but was in fact a "special" or "honorary" deputy sheriff in Marion County for the *sole* purpose of permitting him to carry a firearm and that that status did not create a conflict of interest in his position as an assistant public defender in Volusia County, the instant motion is summarily denied.

PART I

Invalid Aggravating Factor

With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla.1989), our decision in *Rogers*, restricting the applicability of the cold, calculated, and premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect and was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroactive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla.1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

PART II

Ineffective Assistance of Counsel

With regard to Herring's public defender's service as a special deputy, we hold that due process principles require an evidentiary hearing. In *Harich v. State*, 542 So.2d 980 (Fla.1989), we found that this same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to

law enforcement officials affected his ability to provide effective legal assistance. After the evidentiary hearing in *Harich*, the trial judge made detailed findings of fact and denied relief. We affirmed the trial judge, holding that the fact that this public defender was a special deputy in an adjacent jurisdiction, particularly given the circumstances of the duties and status of such deputy sheriff, did not result in a *per se* conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla.1990).

The trial judge in this case concluded that it was not necessary to duplicate the evidentiary hearing regarding this issue because he had previously made factual findings on this identical issue of *Harich*. We find that due process principles do not allow the trial judge to adopt factual findings made in a prior case involving a different defendant, even though it concerns the same issue. Herring must be afforded an opportunity to present evidence and examine and cross-examine witnesses on this issue. Although we recognize that the evidence presented may be duplicative, due process requires that Herring be afforded an opportunity for a hearing on this matter. If other defendants raise this same claim, however, we find that it would be proper for the chief judge to consolidate the cases for one hearing on this single issue.

Accordingly, we remand this cause to the trial judge to have an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance. We deny relief on all other grounds.

It is so ordered.

SHAW, C.J., and OVERTON, GRIMES and McDONALD, JJ., concur as to Part I.

BARKETT and KOGAN, JJ., dissent as to Part I.

SHAW, C.J., and OVERTON, BARKETT, GRIMES and KOGAN, JJ., concur as to Part II.

McDONALD, J., dissents as to Part II.

McDONALD, J., concurs in part and dissents in part with an opinion.

BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

McDONALD, Justice, concurring in part, dissenting in part.

I would approve the trial judge's order denying relief in full. I have never felt that the alleged claim of a conflict of interest by the assistant public defender, simply because he was an honorary deputy sheriff in an adjoining county, had adequate merit to require an evidentiary hearing on this issue.

BARKETT, Justice, concurring in part, dissenting in part.

I agree that Herring is entitled to a hearing on the conflict-of-interest question. However, I would also require, at the very least, a new sentencing hearing. I am dubious about the reliability and proportionality of a death sentence under the circumstances presented here and under current law. As the majority notes, Herring was nineteen years old at the time of the crime; he had a low IQ; a learning disability; and an abused childhood. These were all deemed to be mitigating circumstances. On the other hand, we have found that the weightiest aggravating circumstance, that of cold, calculated, and premeditated murder,

is no longer valid in this case. With the remaining aggravating circumstances weighed against the significant mitigating factors and the fact that this robbery/murder differs little from many others wherein the death penalty was deemed inappropriate, I would remand for a new sentencing hearing.

KOGAN, J., concurs.

SUPREME COURT OF FLORIDA

ROBERT ALLAN TEFFETELLER,

Petitioner,

v.

RICHARD L. DUGGER, ETC.,

Respondent.

ROBERT ALLAN TEFFETELLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

A-59

KENNETH DARCELL QUINCE
n/k/a RASIKH 'ABDUL-HAKIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

RICHARD RANDOLPH
n/k/a MALIK ABDUL SAJJAD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Nos. 73241, 77646, 81649, 81730 and 81950.
March 7, 1996.
Rehearing Denied July 10, 1996.

Prisoners under sentence of death moved for collateral relief, claiming public defender's status as special deputy sheriff constituted conflict of interest, and Supreme Court ordered cases consolidated for hearing. After defendant entered guilty pleas to felony-murder in first degree and burglary and the Supreme Court approved death sentence, 414 So.2d 185, defendant's motion for postconviction relief was denied, and then the Supreme Court reversed denial and remanded for evidentiary hearing, 592 So.2d

669. Second defendant was convicted of murder and using firearm in commission of felony and appealed, and the Supreme Court affirmed conviction but vacated death sentence and remanded, 439 So.2d 840, and on remand defendant was sentence to death and appealed, and after the Supreme Court affirmed death sentence, 495 So.2d 744, defendant appealed denial of motion for postconviction relief and petitioned for writ of habeas corpus. After third defendant was convicted of armed robbery and first-degree murder, he appealed and the Supreme Court affirmed, 446 So.2d 1049, and defendant's motion for postconviction relief was denied, and the Supreme Court remanded for evidentiary hearing, 580 So.2d 135. Fourth defendant was convicted of sexual battery and first-degree murder and the Supreme Court affirmed death sentence, 562 So.2d 331. On remand of all cases, the Seventh Judicial Circuit Court consolidated cases for hearing and denied all defendants' postconviction relief motions. Defendants appealed. The Supreme Court held that exclusion of defendants from courtroom in consolidated hearing during much of the presentation of evidence violated due process.

Vacated and remanded.

Grimes, C.J., concurred in part and dissented in part, and filed an opinion in which Overton, J., concurred.

Michael J. Minerva, Capital Collateral Representative; and Martin J. McClain, Stephen M. Kissinger, Deborah K. Nimmons and Judith J. Dougherty, Assistant Capital Collateral Representatives, Tallahassee, for Petitioner/Appellant in Nos. 73241, 77646.

Robert A. Butterworth, Attorney General; and Richard B. Martell, Tallahassee, and Margene A. Roper and Bar-

bara C. Davis, Assistant Attorneys General, Daytona Beach, for Respondent/Appellee in Nos. 73241, 77646.

Jon M. Wilson and John R. Hamilton of Foley & Lardner, Orlando, and Jeremy G. Epstein, Alan S. Goudiss, James R. Warnot, Jr. and Kathryn Tabner of Shearman & Sterling, New York City, for Appellant in No. 81649.

Robert A. Butterworth, Attorney General and Margene A. Roper, Assistant Attorney General, Daytona Beach, for Appellee in No. 81649.

Michael J. Minerva, Capital Collateral Representative; and Scott W. Braden, Staff Attorney and Terri L. Backhus, Assistant CCR, Tallahassee, for Appellant in No. 81730.

Robert A. Butterworth, Attorney General; and Richard B. Martell and Barbara J. Yates, Assistant Attorneys General, Tallahassee, for Appellee in No. 81730.

Michael J. Minerva, Capital Collateral Representative; and Gail E. Anderson and Harun Shabazz, Assistant Capital Collateral Representatives, Tallahassee, for Appellant in No. 81950.

Robert A. Butterworth, Attorney General and Margene A. Roper, Assistant Attorney General, Daytona Beach, for Appellee in No. 81950.

PER CURIAM.

Appellants, all prisoners under sentence of death, appeal the trial court's denial of their Florida Rule of Criminal Procedure 3.850 motions for postconviction relief. Teffeteller also petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(1) and (9) of the Florida Constitution.

Appellants were represented by Assistant Public Defender Howard Pearl during some stage of their indi-

vidual trials for first-degree murder. At the time that Pearl represented the appellants, he was also a special deputy sheriff in Marion County and an honorary deputy sheriff in Lake and Volusia Counties, none of which was revealed to the appellants. When Pearl's deputy sheriff status came to light, the appellants raised the issue in a rule 3.850 motion for collateral relief, arguing that Pearl's status as a law enforcement officer constituted a conflict of interest with his duties as their defense counsel.

In April 1992, this Court ordered the chief judge of the Seventh Judicial Circuit to consolidate for hearing all cases in which "Howard Pearl" claims were properly raised. During that hearing, the appellants' counsel objected to the courtroom conditions and to the hearing procedure. Counsel objected that the appellants were unable to consult with counsel during the hearing because the appellants were seated in the jury box while counsel were seated across the courtroom in the pews; counsel also argued that this seating arrangement precluded them from consulting their files and referencing documents during testimony. Counsel further objected to the procedure ordered by the court: after the State presented its case-in-chief on the conflict issue, the appellants were removed from the courtroom and only allowed to be present when their separate cases were being presented.

We do not reach the merits of the appellants' claims regarding Pearl's alleged conflict of interest because we find that the hearing below was procedurally flawed and violated the appellants' right to due process. While it is within the trial court's discretion to determine whether or not a prisoner should be present at a postconviction relief hearing, this discretion must be exercised with regard to the prisoner's right to due process. *Clark v. State*, 491

So.2d 545, 546 (Fla.1986). Here, the court denied the appellants' motion for severance and conducted a consolidated hearing, but excluded the appellants from the courtroom while much of the evidence was presented and prevented appellants' counsel from cross-examining many of the witnesses.

Therefore, we vacate the trial court's orders denying the appellants rule 3.850 relief and remand for new proceedings. Furthermore, we find that the appellants' 3.850 claims should be considered on an individual basis before the judges who would normally be assigned to hear the several appellants' 3.850 claims, rather than in a consolidated hearing. The appellants raise factually specific claims regarding Pearl's representation of them, as well as other individual claims regarding their convictions and sentences. The trial courts should consider the appellants' 3.850 claims individually and should conclude these matters within six months of this opinion.

Moreover, as to those claims which raise ineffective assistance of trial counsel that "are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant," *Roberts v. State*, 568 So.2d 1255, 1259 (Fla.1990), the appellants are entitled to an evidentiary hearing. In light of our disposition of Teffeteller's 3.850 appeal, we do not address his habeas claims at this time.

Accordingly, we vacate the orders denying 3.850 relief and remand for proceedings consistent with this opinion.

It is so ordered.

SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

GRIMES, C.J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

GRIMES, Chief Justice, concurring in part, dissenting in part.

These cases seem to have gotten off the track. In *Harich v. State*, 542 So.2d 980 (Fla.1989), the defendant filed a motion for postconviction relief asserting that a conflict of interest existed because his trial counsel, Howard Pearl, was serving as a special deputy sheriff in an adjacent county at the time he represented Harich. We remanded for an evidentiary hearing to determine whether Pearl's duties as a special deputy sheriff would constitute a conflict of interest which would prevent him from providing effective legal assistance to Harich. At the evidentiary hearing, it was determined that Pearl had become a special deputy in order to obtain a permit to carry a gun. Neither he nor the sheriff ever intended for him to act as a deputy and he did not do so. Consequently, we held that Pearl's status as a special deputy did not result in a per se conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla.1990), *cert. denied*, 499 U.S. 985, 111 S.Ct. 1645, 113 L.Ed.2d 740 (1991).

Because Pearl had defended many capital cases in Volusia County, several other convicted defendants who had been represented by him raised the same claim. Because these defendants were not parties to the Harich postconviction hearing, we held that they would also be entitled to a hearing on their claims and suggested that it would be proper for the chief judge to consolidate the cases for one hearing on this single issue. *Herring v. State*, 580 So.2d 135 (Fla.1991).

The instant appeals arise out of the hearing which took place pursuant to our opinion in *Herring*. I concur that the orders entered in these cases must be reversed because the defendants were excluded from the courtroom while much of the evidence was presented during the consolidated hearing. However, I cannot understand why we have now determined that the claims should be considered on an individual basis in which the defendants can raise factually specific claims regarding Pearl's representation of them as well as other individual claims regarding their convictions and sentences.

Depending upon circumstances surrounding Pearl's status as a special deputy, Pearl either had a conflict of interest or he did not. If he had a conflict of interest, all of these defendants would be entitled to a new trial. If he did not, the matter has been set at rest. Whether or not Pearl provided ineffective assistance of counsel in a particular case is a different matter which should be determined objectively in a separate proceeding as it would in any other case involving allegations of ineffective assistance of counsel. The suggestion that even though Pearl did not have a conflict of interest he would less vigorously defend his clients who were facing a death penalty because he had been appointed a special deputy is repugnant to the lawyer's oath of fealty to his or her client. The same argument could be made about lawyers who have friends in the sheriff's office or former prosecutors. In England, the country from which we derived our common law, the loyalty of barristers to their clients in criminal cases is never questioned even though they also prosecute for the crown in other cases and at the same time. In our remand on the Pearl issue, we did not contemplate and we should not now permit each defendant to point to Pearl's conduct during that

defendant's trial to suggest that he was selling them out because he was a special deputy.

Therefore, I dissent from the scope of the hearings apparently contemplated by the majority opinion and see no need to try the claims separately when they all involve a single issue.

OVERTON, J., concurs.

676 So.2d 369, 21 Fla. L. Weekly S107

SUPREME COURT OF FLORIDA

No. 89937.
September 24, 1998
Rehearing Denied January 14, 1999

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., of armed robbery and first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, 446 So.2d 1049, affirmed. Defendant sought postconviction relief. The Circuit Court, denied motion. Defendant appealed. The Supreme Court, 676 So.2d 369, remanded. On remand, the Circuit Court, William C. Johnson, J., denied motion. Defendant appealed. The Supreme Court held that public defender's status as a special deputy sheriff created no actual conflict of interest and did not result in ineffective assistance.

Affirmed.

Leon H. Handley of Gurney & Handley, P.A., Orlando, Florida, Jon M. Wilson and John R. Hamilton of Foley &

Lardner, Orlando, Florida, and Jeremy G. Epstein, Alan S. Goudiss, James R. Warnot, Jr., Kathryn Tabner, Daniel Schimmel, and Steven M. Davidoff of Shearman & Sterling, New York, New York, for Appellant.

Robert A. Butterworth, Attorney General, and Kenneth S. Nunnelley, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Ted Herring, a prisoner under sentence of death, appeals the trial court's denial of his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The issue in this appeal is whether Herring's public defender had an actual conflict of interest that adversely affected his performance. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm the ruling of the trial court.

On May 29, 1981, a convenience store in Daytona Beach was robbed and the store clerk was found dead from two gunshot wounds. A hold-up note with a fingerprint on it was recovered from the store, and the fingerprint was subsequently determined to be that of Ted Herring. Herring was arrested and interrogated regarding the crimes. Herring waived his *Miranda* rights and made statements to police officers William Anderson, Dozell Varner, and Martin White. In his first statement to the officers, which was taped, Herring said that he went to the store with the intent to commit a robbery, but that prior to committing the crime a second man robbed the store and killed the clerk. In a second unrecorded statement made privately to Officer Varner, Herring confessed that he shot the clerk in the head and then, while the clerk was lying on the ground, shot the

clerk a second time to eliminate him as a possible witness. In a final taped statement to the officers, Herring claimed that he robbed the store but accidentally shot the clerk twice after the clerk tried to grab his gun.

In February 1982, Herring was tried in Volusia County for armed robbery and first-degree murder. Herring was represented at the trial by two public defenders, Howard Pearl and Peyton Quarles. Pearl conducted the guilt phase of the trial and Quarles handled the penalty phase. Officer Varner testified at the trial regarding Harrison's unrecorded statement. At the time of his testimony, Officer Varner had received twenty-two oral reprimands for minor misconduct, one written reprimand for tardiness, and a one-day suspension for an accident involving a city vehicle. Officer Varner had also received eight commendations for his police work, including a commendation for the arrest of Ted Herring. Following the direct examination of Officer Varner, Pearl's cross-examination focused only on whether Herring received food and water during his interrogation. Pearl's cross-examinations of officers Anderson and White were also limited to the topics of food and rest.

Herring testified at trial that his first statement to the officers was accurate—that the robbery and murder were committed by a second gunman. Herring denied having a private conversation with Officer Varner and claimed that the second taped confession was coerced. In closing arguments, Pearl, consistent with Herring's testimony, told the jury that a second gunman robbed the store and killed the clerk. Pearl asked the jury to question the testimony of the interrogating officers. Pearl also informed the jury that "[policemen] do a very difficult and dangerous job of community service, and the policemen that you saw, Mr.

Varner and Mr. Anderson, Mr. White, are all good policemen, good detectives."

Herring was convicted of first-degree murder and sentenced to death. In aggravation, the trial judge found that Herring (1) was previously convicted of an unrelated armed robbery; (2) committed the murder in the course of a robbery; (3) committed the murder for the purpose of avoiding arrest; and (4) committed the murder in a cold, calculated and premeditated manner (CCP). The judge's sentencing order reflects that the "avoiding arrest" aggravator was based on Officer Varner's testimony. In mitigation, the judge found that Herring was nineteen years of age at the time of the crime and that he had a difficult childhood and learning disabilities. This Court affirmed Herring's convictions and death sentence in *Herring v. State*, 446 So.2d 1049 (Fla.1984), but subsequently struck down the application of the CCP aggravator. *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987). We rejected a motion to vacate Herring's death sentence that was predicated on our decision to recede from the application of the CCP aggravator. *Herring v. State*, 580 So.2d 135 (Fla.1991).

In his first rule 3.850 motion, Herring raised an ineffective-assistance-of-counsel claim based on deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The trial judge denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla.1986).[1] Herring filed a second rule

1 Of the denial of Herring's first rule 3.850 motion, we wrote, "The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla.1981). We fully agree with the trial judge's findings and commend him for his detailed explanation." *Herring*, 501 So.2d at 1280.

3.850 motion and claimed, among other things, that he received ineffective assistance of counsel due to a conflict of interest between Pearl's status as a special deputy sheriff and Pearl's responsibilities owed to Herring.[2] The trial judge denied the motion, but this Court remanded the ineffectiveness issue for an evidentiary hearing. *Herring v. State*, 580 So.2d 135 (Fla.1991). Herring's hearing was consolidated with the hearings of eight other defendants who had raised similar "Howard Pearl claims."[3] The judge held that none of the defendants were adversely affected by Pearl's special deputy status. However, in *Teffeteller v. Dugger* (*Herring v. State*), 676 So.2d 369 (Fla.1996), this Court remanded four of the cases, including Herring's case, for individual evidentiary hearings solely on Pearl's status as a special deputy sheriff. As directed by this Court, a second evidentiary hearing was held, and Herring's motion was again denied. Herring now appeals the trial judge's ruling and raises the following issues: (1) whether the trial judge erred in finding that Pearl was not encumbered by an actual conflict of interest; (2) whether Pearl's failure to testify regarding a strategic rationale for his trial actions or omissions preludes the State from showing that his performance was not adversely affected by his conflict; and (3) whether the trial judge's findings of fact regarding Dr. Spitz's testimony are clearly erroneous.

In his first claim, Herring challenges the trial judge's denial of his ineffective-assistance-of-counsel claim. Her-

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2 In a separate case we held that Pearl's special deputy sheriff status was not a *per se* conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla.1990).

3 The other defendants were Robert Teffeteller, Kenneth Quince, Robert Henderson, Gerald Stano, Joel Wright, Johnny Robinson, Felix Castro, and Richard Randolph.

ring argues that Pearl's personal interest in maintaining his special deputy sheriff status required him to remain in the good graces of law enforcement personnel. Herring asserts that Pearl's need to ingratiate himself to law enforcement officials was an actual conflict of interest with his obligations to Herring. Herring claims that Pearl's conflict of interest adversely affected his representation in the following ways: (1) adopting the incredible second gunman defense to the exclusion of the more plausible accidental shooting defense; (2) failing to aggressively cross-examine law enforcement witnesses, including failing to question Officer Varner regarding his disciplinary record; (3) bolstering the credibility of law enforcement witnesses; and (4) abandoning Herring during the penalty phase of the trial.

It must be understood at the outset that Herring cannot raise in this appeal an ineffectiveness claim based on deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That claim has already been presented to and rejected by this Court, and Herring is procedurally barred from raising the claim in this appeal. We note that, had Pearl brought out Officer Varner's minor reprimands as Herring claims he should have, the door would have opened for the State to introduce Varner's commendations. In addition, Pearl's practice of not challenging the conduct of police officers in Volusia County absent hard evidence of misconduct was not unreasonable at the time Herring's case was tried in 1982. The alleged deficiency of Howard Pearl's performance is not the issue in this appeal. The only issue properly before this Court is whether Pearl had an actual conflict of interest that caused him to render ineffective assistance.

To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Buenoano v. Dugger*, 559 So.2d 1116, 1120 (Fla.1990). Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. *See Buenoano v. Singletary*, 74 F.3d 1078, 1086 n. 6 (11th Cir.1996); *Porter v. Singletary*, 14 F.3d 554, 560 (11th Cir.1994); *Oliver v. Wainwright*, 782 F.2d 1521, 1524-25 (11th Cir.1986). Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is "insufficient to impugn a criminal conviction."

The trial judge made the following findings in his order denying Herring's ineffectiveness claim:

> Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family."* The

* At the time Mr. Pearl sought to carry a concealed firearm there were no provisions for the sanctioning of private individuals to carry concealed weapons throughout the State of Florida.

sheriff of Marion County in 1970, Doug Willis, apparently granted Mr. Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm. . . . Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.

Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriff's Self-Insurance Fund, he had no criminal law enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff. . . .

Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and [was] never given the authority to make any arrests, stops or any other duties as a deputy sher-

iff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified that Mr. Pearl's status was "honorary" in nature and was solely for the purposes of Mr. Pearl being able to carry a concealed firearm.

In addition, James P. Gibson, the Public Defender for the Seventh Judicial Circuit at present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as a special deputy sheriff and that status was honorary and only for the purpose of carrying a concealed firearm. . . . Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Mari-

> on County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.
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> . . . .
>
> Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.

As noted in the order, the trial judge found that Herring failed to establish the first prong of *Cuyler*—that Pearl labored under an actual conflict of interest. We agree. The record reveals no evidence suggesting that Herring's interests were impaired or compromised as a result of Pearl's special deputy status.

Herring argues that the trial judge erred as a matter of law in failing to recognize that a significant "adverse

effect" is sufficient alone to demonstrate an "actual conflict of interest." For this proposition, Herring cites *Freund v. Butterworth*, 117 F.3d 1543 (11th Cir.1997), *vacated*, *Freund v. Butterworth*, 135 F.3d 1419 (11th Cir.1998). Although the cited *Freund* decision is a legal nullity, we note that Herring mischaracterizes the holding of the decision and we would not grant him relief even if the decision were law. *Freund* does state that "inquiries into 'actual conflict' and 'adverse effect' necessarily interrelate," 117 F.3d at 1571 (emphasis added), but does not state that ineffectiveness can be proven by evidence of adverse effect alone. In fact, in *Freund*, the Eleventh Circuit identified at least three separate sources of actual conflict. Although a court's inquiry into "actual conflict" and "adverse effect" may overlap, the *Cuyler* decision is clear on its face that the defendant must satisfy both prongs of the claim to prove ineffective assistance of counsel. Therefore, because Herring failed to demonstrate that an actual conflict of interest existed, we do not reach the issue of whether the conflict adversely affected Pearl's representation. *See Porter v. Singletary*, 14 F.3d 554, 560-61 (11th Cir.1994) (declining to address question of adverse effect on representation without proof of actual conflict).

We reject Herring's second and third claims because they pertain solely to the issue of "adverse effect" under *Cuyler*. Accordingly, we affirm the trial judge's denial of Herring's second rule 3.850 motion.

It is so ordered.

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS, ANSTEAD and PARIENTE, JJ., concur.

730 So.2d 1264, 23 Fla. L. Weekly S491

IN THE
CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT,
IN AND FOR
VOLUSIA COUNTY, FLORIDA.

CASE NO. 81-1957-CC

STATE OF FLORIDA,

vs.

TED HERRING,

Defendant.

ORDER

THIS CAUSE coming on to be heard upon Defendant's Motion for 3.850 relief; and the Court having read the Defendant's Motion (pages 1-102, and exhibits), and the response of the State thereto; the Court file; the trial transcript; and the decision of *Herring vs. State*, 446 So.2d 1049 (FL. 1984); and the Court being otherwise fully advised in the premises finds as follows:

1. The Defendant was found guilty by a jury of first degree murder and robbery with a firearm. By a vote of eight (8) to four (4) the jury recommended the Defendant be sentenced to death. On March 1, 1982 this Court did sentence the Defendant to death for the murder, and imposed a 99 year sentence for the robbery.

2. The Florida Supreme Court affirmed the conviction and sentence (*Herring vs. State*, 446 So.2d 1049 (FL. 1984)). Certiorari was denied by the United States Supreme Court (*Herring vs. State of Florida*, 1055 S.Ct. 396, 83 L.Ed. 330 (1984).

3. The Florida Supreme Court decision at 446 So.2d 1049 dealt with the following issues:

A. Whether the trial court erred in excusing a death-scrupled juror.

B. Whether the trial court should have allowed defense counsel for other first degree murder defendants to testify that their client received life sentences for similar crimes.

C. Whether the trial court correctly excluded defense counsel from reading poems of the Defendant contained in a clinical report.

D. Whether the trial court improperly found as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest.

E. Whether the trial court improperly found the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

F. Whether the death sentence is appropriate in light of other decisions.

4. This Court does agree with the State of Florida that many of the matters complained of in Defendant's motion were or could have been raised on direct appeal. This Court will not consider these matters as a basis for 3.850

relief. Specifically, the following matters were or could have been raised on direct appeal:

A. The applicability of the cold and calculating aggravating factor.

B. The applicability of the avoiding arrest aggravating factor.

C. That the heightened premeditation and the avoidance of arrest aggravating circumstances were applied on the basis of the same aspect of the shooting, and were thus improperly doubled.

D. The admission of the probation officer's testimony was constitutional error.

E. The jury instructions regarding the imposition of the death penalty were constitutionally inadequate.

F. The trial judge failed to consider the proportionality of the death sentence with sentences imposed in other cases.

G. The trial judge unconstitutionally surrendered to the jury his obligation to act as final arbiter in imposing the sentence.

H. The Defendant was sentenced by an arbitrary and racially discriminating capital sentence scheme.

I. The prosecutor improperly suggested that petitioner might be granted parole if given a life sentence.

J. The exclusion of the death-scrupled jurors.

K. That Defendant's confession was improperly admitted into evidence.

5. The real nub of Defendant's motion is the claim of ineffective trial counsel. Despite the standards set forth in *Knight* and *Strickland* it is very difficult to go back and determine whether trial counsel's actions or inactions amounted to ineffective assistance of counsel. The Court will attempt to deal with the allegations of ineffectiveness and analyze them in light of *Knight* and *Strickland.*

A. In Paragraph "85" of the 3.850 the Defendant alleges there were reports (see Defendant's exhibits "3" and "4") that the Defendant had serious mental and emotional problems. The Defendant now complains these reports should have been introduced. First it should be noted that at least one of the reports was a result of an interview done when the Defendant was 13 years old. Secondly, the defense did establish learning disabilities and psychological problems through the testimony of the Defendant's mother. Thirdly, one of the reports indicates the mother, who was a defense witness and represented to be a concerned mother, was not keeping the child's appointments with the counselor. Lastly, the reports indicate the Defendant was of dull normal intelligence. Taking this all into consideration this Court does not find the failure to introduce these reports was a professional deficiency.

B. In Paragraph "86" of the 3.850 the defense claims trial counsel failed to adequately present other readily available mitigation evidence. This is perhaps the most difficult assertion to analyze. Here more than any other area there is tendency to second guess. In every case that is lost counsel may go back, with the advantage of hindsight, and say this or that should or could have been done.

The defense had the Defendant's mother testify during the sentencing phase. She did establish the Defendant's

home life was not good; his parents were separated; he was hyperactive with a low IQ and a learning disability; he had psychological problems; that his mother loved Ted. The psychological reports would have been cumulative to the mother's testimony. It also most be stressed that the trial court did list and consider these matters as mitigating factors.

As to the information set forth in exhibits "7" and "8" the Court questions the importance of the information from the Defendant's former teachers. Obviously much time had passed since they had contact with the Defendant. Their testimony was of doubtful value.

Perhaps the defense should have had the Defendant's other relatives testify on his behalf. While to a large degree it may have been cumulative to that of the mother, perhaps it may in someway have helped the Defendant. But this Court cannot conclude that trial counsel was deficient in presenting the mother alone. It must be remembered that the area of who trial counsel selects to testify if frought with peril. Even the mother, who was an effective defense witness, did admit her son was involved in drug related problems in New York. So trial counsel is caught in a dilemma. He must try to put on mitigating evidence yet not let the State have an opportunity to further damage the Defendant either by cross or rebuttal. This is especially true where the Defendant was charged with several other armed robberies and apparently was having drug related problems in New York City. All in all the Court finds trial counsel was not deficient in only presenting the mother's testimony. This is a matter of trial strategy and should not be second guessed.

C. The defense now contends that trial counsel should have challenged the State's argument that the murder was

cold, calculated and premeditated. Yet the Defendant denied he was the one who shot Dale Hoeltzel. He claimed another person murdered the clerk. In any case, the Florida Supreme Court did ultimately determine the murder to be cold, calculating, and premeditated.

D. As to the testimony of the probation officer, Mary White, defense counsel did object to statements allegedly made by the Defendant to White. The defense now claims he did not object for the right reasons nor cite proper case law. This contention may be correct in light of *Sireci vs. State*, 399 So.2d 964. Yet counsel did object to and oppose the testimony. Also the State had yet to concede that the murder was not heinous, atrocious, and cruel. The Court finds this act or omission was not a substantial and serious deficiency measurably below the standard of performance expected of a competent attorney.

E. Paragraph 104 complains that trial counsel did not object to cross by the State as to why the Defendant's mother sent Herring to Florida. Yet the door was opened to this cross because on direct the mother testified she sent him to Florida about two years ago. The State had the right and duty to ask why he was sent to Florida. A defense objection to this line of questioning would have been overruled. Again this particular complaint in the 3.850 shows how trial counsel is "damned if he does and damned is he doesn't." Most certainly the 3.850 would complain if the mother were not called to testify; now the 3.850 complains about matters her testimony opened the door to.

F. Paragraph 109 complains about trial counsel's failure to properly introduce Defendant's poems (see 3.850 exhibit "3"). Essentially trial counsel tried to "sneak" in the

poems. He was caught and prevented from doing it. Had he introduced the St. Luke's Hospital report containing the poems it would have shown the poems were not original but rather based on popular songs. Also the second page of the report again indicates the mother of the Defendant was not keeping appointments. This would have contradicted her testimony that she did all she could for Ted.

Trial counsel did not correctly try to introduce the poems. But again the Court cannot say this was a serious professional deficiency. Finally, the Court cannot say the Defendant was prejudiced by not having the poems introduced, or if they were introduced the result would be any different.

G. Paragraph 112 complains of trial counsel's failure to properly and successfully argue that testimony should be allowed showing that similar cases resulted in non-death sentences. The Florida Supreme Court specifically held this testimony was not admissible (see *Herring* at Pages 1056 and 1057). Despite what arguments the defense now makes, that type of testimony was not admissible.

H. Paragraph 119 and 120 complain trial counsel told the jury not to consider the age of the Defendant as a mitigating factor. This Court accepts the State's version (see Page 10 of State's response). Mr. Quarles definitely did argue to the jury that age was a mitigating factor, and this Court found it to be so.

6. This Court must view trial counsel's alleged errors and omissions in light of the case as a whole. It was a difficult case from the defense standpoint. The Defendant confessed to the crime. Efforts to suppress the confession

failed. The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well. There was little the defense could do to save the Defendant after that.

Additionally, the aggravating factors in this case strongly outweighed the mitigating factors. There were four aggravating and only two mitigating factors. The mitigating factor of age was not strong. The Defendant was at the point where his age was not that much of a consideration. Other non-statutory mitigating factors were in fact established by the defense. They were considered by the jury and the Court. These mitigating factors were not particularly significant. This Court finds that even if the non-statutory mitigating factors were bolstered by teacher's statements, comments of relatives, and poems of the Defendant, the result would be no different.

7. The Court concludes that the *Knight/Strickland* tests are not met. The trial defense was not deficient, nor did it prejudice the Defendant. The Defendant received a fair trial and a fair sentence hearing.

8. The Court carefully considered holding an evidentiary hearing on this matter. The Court is aware that normally allegations of ineffective assistance of counsel, especially in capital cases, require a hearing. However, after carefully reviewing the record, the court file, the 3.850 motion, and the State's response, all matters necessary for this court or any other reviewing court to fairly rule on the defense allegations are set forth in the existing records. There is no

need for further hearings or evidence. The Court also finds the above records conclusively demonstrate the Defendant is not entitled to relief, and the motion may be denied without an evidentiary hearing.

WHEREFORE, it is ORDERED that Defendant's Motion for 3.850 relief is denied.

DONE AND ORDERED this 24 day of July, 1985, at Daytona Beach, Volusia County, Florida.

Defendant has 15 days from the date hereof to file his Motion for Rehearing, and 30 days to file his Notice of Appeal.

/s/ [S. JAMES FOXMAN]
S. JAMES FOXMAN, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Order have been mailed and/or delivered to the following persons this 25 day of July, 1985:

Lewis R. Stark, Assistant State Attorney, Courthouse Annex, 125 East Orange Avenue, Daytona Beach, FL 32014;

Jeremy G. Epstein, Attorney for Defendant, Shearman and Sterling, 53 Wall Street, New York, NY 10005.

/s/ [VICKY L. MYERS]
JUDICIAL ASSISTANT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
/s/ [initials]
03 APR 14 PM 2:28
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE No. 6:99-cv-1413-Orl-18KRS

TED HERRING,

Petitioner,

—vs—

DENNIS T. O'NEIL, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Petitioner Ted Herring take nothing and the action be dismissed.

Date: April 14, 2003

SHERYL L. LOESCH, CLERK

By: /s/ J. McCLUNG
J. McClung, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED

03 APR 14 PM 1:57

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE No. 6:99-cv-1413-Orl-18KRS

TED HERRING,

Petitioner,

v.

MICHAEL W. MOORE, et al.,

Respondents.

ORDER

This case is before the Court for review of an Amended Corrected Petition for Writ of Habeas Corpus (Doc. No. 10, filed November 19, 1999) filed by a person in state custody, Ted Herring, pursuant to 28 U.S.C. § 2254. Respondents filed a response to the petition (Doc. No. 17, filed February 7, 2000), and Petitioner filed a reply to the response (Doc. No. 20, filed April 20, 2000). This case was administratively closed on August 27, 2002, and reopened on February 5, 2003 (Doc. No. 34).

I. STATEMENT OF THE FACTS

The Court adopts the following facts as set out in the Supreme Court of Florida's opinion, in disposing of Peti-

tioner's direct appeal, *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984)[1]:

> Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:
>
> > This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].
>
> A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.
>
> Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He

[1] Petitioner was charged by indictment with first degree murder and robbery.

was taken to the Daytona Beach Police Department, where he was advised of his Miranda rights. Herring signed a written waiver of his Miranda rights and was interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

> Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor.
>
> Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's.

Id. at 1051-52.

II. PROCEDURAL HISTORY

Petitioner was convicted of first degree murder and armed robbery. The trial court followed the jury's recommendation and sentenced Petitioner to death for the murder conviction. The trial court also sentenced Petitioner to imprisonment for a term of ninety-nine years as to the robbery conviction. Petitioner appealed the judgments and sentences to the Supreme Court of Florida, raising four claims,[2] and that court affirmed the convictions and sen-

[2] The four claims included the following: (1) that the trial court violated his Sixth and Fourteenth Amendment rights and state law when it excused a prospective juror, Mr. Cameron, for cause; (2) that the trial court erred when it refused to allow him to present relevant evidence in mitigation; (3) that the trial court violated his state and federal constitutional rights when it imposed the death sentence based on inappropriate aggravating circumstances and ignored valid mitigating circumstances; and (4) that the Florida capital sentencing statute was unconstitutional on its face and as applied.

tences. *See Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984) ("*Herring I*").

Petitioner next filed a motion for postconviction relief with the state trial court,[3] which was denied without an evidentiary hearing. The Supreme Court of Florida affirmed the denial. *Herring v. State*, 501 So.2d 1279 (Fla. 1987) ("*Herring II*").

Petitioner then filed a petition for writ of habeas corpus with the Supreme Court of Florida, alleging various instances

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[3] Petitioner raised fourteen claims for relief: (1) that the "heightened premeditation" aggravating circumstance was erroneously and unconstitutionally applied; (2) that the "avoidance of arrest" aggravating circumstance was erroneously and unconstitutionally applied; (3) that the "heightened premeditation" and the "avoidance of arrest" aggravating circumstances were applied on the basis of the same aspect of the crime and, thus, were improperly doubled; (4) that the admission of the probation officer's testimony was erroneous and unconstitutional; (5) that he received ineffective assistance of counsel at sentencing; (6) that the jury instructions regarding imposition of the death penalty were constitutionally inadequate; (7) that the trial judge failed to consider the proportionality of the death sentence as compared to other cases in which the death penalty had been imposed; (8) that the trial judge unconstitutionally surrendered to the jury his obligation to act as final arbiter in imposing the sentence; (9) that the sentence was the result of an arbitrary and racially discriminatory capital sentencing scheme; (10) that the prosecutor improperly suggested during her closing argument that Petitioner might be granted parole and would be out on the streets to "kill and rob again" if given life imprisonment; (11) that the exclusion for cause of a prospective juror because of his views on capital punishment violated Petitioner's constitutional rights; (12) that the trial jury did not constitute a representative cross-section of Petitioner's community because of the exclusion of persons with conscientious or religious scruples against the death penalty; (13) that the trial jury was biased in favor of the State on issues of guilt or innocence; and (14) that Petitioner's confession was unconstitutionally admitted into evidence.

of ineffective assistance of appellate counsel.[4] The Supreme Court of Florida denied the petition and affirmed Petitioner's conviction and sentence. *See Herring v. Dugger*, 528 So.2d 1176 (Fla. 1988) ("*Herring III*").

Petitioner subsequently filed a federal habeas petition in this Court, which was denied without prejudice to allow Petitioner the opportunity the exhaust his claims in the state Courts.

Petitioner later filed a second motion for postconviction relief with the state trial court, arguing that the decision in *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988), required that his death sentence be vacated. The trial court entered a non-final order denying

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[4] Petitioner alleged that appellate counsel was ineffective for the following reasons: (1) failure to argue that the admission of the probation officer's testimony was constitutional error and was impermissible under Florida law; (2) failure to argue that the admission of the Petitioner's confession into evidence violated his Fifth, Sixth, and Fourteenth Amendment rights; (3) failure to argue that the trial court impermissibly applied two aggravating circumstances on the basis of the same aspect of the shooting; (4) failure to argue that the jury instructions regarding the imposition of the death penalty were constitutionally inadequate; (5) failure to adequately argue that the prosecutor, in her closing argument, improperly argued that Petitioner was young enough to be out on the streets "to kill and rob again" if given life imprisonment; (6) failure to adequately argue that Petitioner's rights under the Sixth and Fourteenth Amendments were violated by the exclusion of a member of the venire panel because of his views on the death penalty; (7) failure to adequately argue that the trial court erroneously found that the murder was committed in a cold, calculated, and premeditated manner; (8) failure to adequately argue that the trial erred in finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and (9) failure to adequately inform the court of persuasive supplemental authority that was issued between the time his brief was filed and the decision in the case was announced.

the claim but allowing Petitioner the opportunity to amend his motion to include a claim of ineffective assistance of counsel based on trial counsel's status as a special deputy sheriff at the time of Petitioner's trial.[5] Petitioner filed an amended Rule 3.850 motion,[6] which was eventually denied. Petitioner appealed the denial, and the Supreme Court of Florida remanded the case to the trial judge for purposes of conducting an evidentiary hearing to determine whether trial counsel's service as a special deputy sheriff affected his ability to provide effective legal assistance. *See Herring v. State*, 580 So.2d 135 (Fla. 1991) ("*Herring IV*").

The trial court held a hearing, which was consolidated with the hearings of eight other defendants, who also had been represented by Mr. Pearl and had asserted similar claims: Robert Teffeteller, Kenneth Quince, Robert Dale Henderson, Gerald Stano, Joel D. Wright, Johnny Robinson, Felix Castro, and Richard Randolph. The trial court held that none of the defendants was adversely affected by Mr. Pearl's special deputy status. Petitioner and others appealed the denial, and, in *Teffeteller v. Dugger*, 676 So.2d 369 (Fla. 1996), the Supreme Court of Florida remanded four of the cases, including Petitioner's case, for individual evidentiary hearings solely on the issue of Mr. Pearl's status as a special deputy sheriff.

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[5] Howard Pearl was Petitioner's trial counsel.

[6] Petitioner claimed that his trial counsel's undisclosed conflict of interest in violation of the laws and constitution of the State of Florida denied him the effective assistance of counsel guaranteed under the Florida Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Pursuant to the directive of the Supreme Court of Florida, a second evidentiary hearing was held. The trial court again denied Petitioner's motion, and the Supreme Court of Florida affirmed the denial. *Herring v. State*, 730 So.2d 1264 (Fla. 1998), *cert. denied*, 527 U.S. 1003 (1999) ("*Herring V*").

III. MERITS OF THE PETITION

A. Claims Pertaining to Guilt

Claim Eight

Petitioner contends that he was denied effective assistance of counsel because his trial counsel's status as a special deputy sheriff created a conflict of interest. According to Petitioner, Mr. Pearl's status as a special deputy sheriff created an actual conflict of interest that adversely affected his representation of Petitioner. Petitioner argues that the actual conflict arose because Mr. Pearl had a "personal interest in maintaining the ability to carry a concealed firearm, which in turn depended upon [his] remaining in the good graces of the Marion County Sheriff." (Doc. No. 11 at 77.) According to Petitioner, "[i]n every single instance where [Mr.] Pearl had a choice, . . . he made the choice least likely to offend the law enforcement officials to whom he was beholden." *Id.*

1. *The State Court Proceedings*

Petitioner raised this conflict of interest claim in his amended second Rule 3.850 motion, and the state trial court conducted an evidentiary hearing from November 25 through 27, 1996. A variety of witnesses were presented at the hearing.

Mr. Moreland, who was the United States Marshal for the Middle District of Florida at the time he testified, was the Marion County Sheriff from 1973 through 1992. (Volume 34, R. 256.)[7] Mr. Moreland's predecessor, Doug Willis, had authorized Mr. Pearl to be a special deputy sheriff. (Volume 35, R. 315.) As a courtesy to his predecessor, Mr. Moreland permitted all persons who were already special deputy sheriffs, including Mr. Pearl, to maintain such a status. (Volume 34, R. 279, 291; Volume 35, R. 314.) From January 3, 1973, through May 17, 1989, Mr. Pearl maintained his status as a special deputy sheriff for the Marion County Sheriff's Department. (Volume 34, R. 260-61.)

Mr. Moreland understood that Mr. Pearl applied to be a special deputy sheriff in order to carry a weapon for personal protection. (Volume 34, R. 267, 295; Volume 35, R. 311.) As a special deputy sheriff, Mr. Pearl was not entitled to any compensation, equipment, or benefits from the Sheriff's Office; had no authority to make arrests; had no law enforcement authority; and was required to purchase liability insurance to protect the County and the Sheriff's Office. (Volume 34, R. 278-79, 288, 294, 297-98, 300; Volume 35, R. 313.) According to Mr. Moreland, Mr. Pearl was "never a law enforcement officer." (Volume 34, R. 268, 270, 305.) Mr. Pearl had no duties as a special deputy sheriff; he was more of an honorary deputy. (Volume 34, R. 295, 302-03; Volume 35, R. 312, 314.)

Mr. Pearl testified that he was a special deputy sheriff from 1970 to 1989. (Volume 33, R. 30.) According to Mr. Pearl, he applied to be a special deputy sheriff so that

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[7] References to the record will identify the volume number of Respondents' appendix and then the page number.

he could carry a concealed firearm statewide. (Volume 34, R. 165-66.) He had no status as a law enforcement officer, no duties, no uniform, and no arrest powers. *Id.* at 166, 167-69. He was not certified as a law enforcement officer; he received no compensation or uniform from the Sheriff's Office; and he made no arrests and performed no duties as a special deputy. *Id.* at 167, 168-69, 171. In fact, the title was honorary in nature. *Id.* at 167. In the late eighties, Mr. Pearl was able to obtain a state license to carry a concealed weapon. Shortly thereafter, he resigned his position as special deputy sheriff.[8] (Volume 33, R. 47-48.)

Mr. Pearl did not disclose to Petitioner that he was special deputy sheriff. *Id.* at 57. He testified that his status as a special deputy sheriff did not effect his representation of his clients; he considered there to be no connection between his duties as a public defender and his special deputy sheriff status. (Volume 34, R. 170.)

James Gibson, who was the Public Defender at the time of Petitioner's trial, testified that it was common knowledge in the legal community that Mr. Pearl was a special deputy and that he frequently carried a firearm. (Volume 38, R. 725-26.) In 1987, after state law changed, he suggested that Mr. Pearl resign his commission as a special deputy in order to eliminate the issue in the future. *Id.* at 728, 732. However, Mr. Gibson did not believe that Mr. Pearl's status as a special deputy had any effect on his performance during Petitioner's trial. *Id.* at 731-32.

Stephen Gillers, a professor at the New York University School of Law, testified for Petitioner as an expert in the field of legal ethics. Mr. Gillers opined that Mr. Pearl "had

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[8] Mr. Pearl indicated that the Public Defender, James Gibson, also suggested that Mr. Pearl resign his position as a special deputy sheriff. (Volume 33, R. 47-48.)

a conflict of interest between his personal interest and continuing to be able to carry a concealed firearm . . . and the client's interest in having a lawyer who can exercise professional judgment on his behalf to aggressively impeach the credibility of police officers in a neighboring county." (Volume 36, R. 475.) In addition, Petitioner presented James M. Russ as an expert in criminal defense. Mr. Russ testified to what he believed were various deficiencies in Mr. Pearl's performance during Petitioner's trial. (Volume 37, R. 600-719.)

Shortly after the conclusion of the evidentiary hearing, the state trial court issued a comprehensive written opinion addressing Petitioner's conflict of interest claim. (Volume 31, R. 1012-18.) In rejecting Petitioner's claim, the state trial court found

> as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner than many other individuals received during that time period. Counter to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

Id. at 1016. The state trial court then concluded that neither a *per se* nor an actual conflict of interest existed

between Mr. Pearl and Petitioner. *Id.* at 1016-18. These conclusions were affirmed on appeal in *Herring V.*

2. *Legal Discussion*

Because claim eight was adjudicated on the merits in the state court, this Court may grant habeas corpus relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *See* 28 U.S.C. §§ 2254(d)(1) and (2); *see also Williams v. Taylor*, 529 U.S. 362 (2000). Thus, this Court must consider four elements: (a) the governing legal principle relied upon by the state court; (b) whether the state court's decision was contrary to governing United States Supreme Court precedent; (c) whether the state court unreasonably applied the governing United States Supreme Court precedent; and (d) whether the state court made a unreasonable determination of the facts. *See Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002); *see also* 28 U.S.C. § 2254(d).

In assessing Petitioner's conflict of interest claim, the state trial and appellate courts utilized the standard set forth by the United States Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). This case is the controlling legal authority to be applied to conflict of interest claims such as the instant one raised by Petitioner. *See Reynolds v. Chapman*, 253 F.3d 1337, 1342 (11th Cir. 2001) (holding that ineffective assistance of counsel claims premised on a conflict of interest are governed by *Cuyler*) Thus, the state courts correctly identified the governing legal principle.

In *Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002), the United States Supreme Court discussed the meaning of "contrary to" and "unreasonable application" as used in 28 U.S.C. § 2254(d):

> As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one.

Utilizing the standards set forth in *Bell* and *Williams*, this Court finds that the state appellate court's decision was not "contrary to" the governing legal authority. The state court, by correctly identifying *Cuyler* as the controlling legal authority on claims of conflict of interest by counsel, did not reach an opposite conclusion from the Supreme Court on a question of law. Additionally, Petitioner has not cited to any decision of the Supreme Court that, faced with materially indistinguishable facts, reached a decision different from the state court's in this case. Therefore, the

state court's decision was not "contrary to" governing United States Supreme Court precedent.

Furthermore, the Court is unable to say that the state court's application of the *Cuyler* standard was objectively unreasonable. As noted in *Bell*, "an unreasonable application is different from an incorrect one." *Bell*, 122 S.Ct. at 1850. This Court may not grant the writ simply because it determines that the state court erroneously or incorrectly applied the correct governing law. Relief is only warranted if the application was unreasonable. *Id.* Under this demanding standard, the state court's determination that Mr. Pearl did not labor under a conflict of interest was reasonable.

In fact, this Court agrees that Mr. Pearl's status as a special deputy sheriff did not create an actual conflict of interest. After conducting an evidentiary hearing, the state trial court made a factual determination that Mr. Pearl "never was and never has been a law enforcement officer with the Marion County Sheriff's Department." (Volume 31, R. 1016.) This factual finding is entitled to a presumption of correctness in these proceedings. *See* 28 U.S.C. § 2254(d) (2002). Furthermore, the uncontroverted testimony was that Mr. Pearl obtained and maintained his special deputy status solely in order to be able to carry a firearm for personal protection while traveling throughout the state. He had no law enforcement duties, no arrest powers, no uniform, and received no compensation from the Sheriff's Office. The title was merely honorary. Once state law changed to permit Mr. Pearl to obtain a state license to carry a concealed firearm, he resigned his special deputy position. Moreover, Mr. Pearl testified that he considered his status as a special deputy to be irrelevant to his representation of Petitioner. Given this set of circumstances, this Court concludes that

Mr. Pearl's representation of Petitioner did not present him with "inconsistent interests"; therefore, no actual conflict of interest existed. Petitioner has not demonstrated, and this Court is unable to conclude, that the state court's decision was either "contrary to" or an "unreasonable application of" *Cuyler*.

Finally, Petitioner has not demonstrated that the state court made an unreasonable determination of the facts. "To establish that habeas relief is warranted on the § 2254(d)(2) ground that the state court's decision was based on an 'unreasonable determination of the facts in light of the evidence presented in the sate court proceedings,' a petitioner must rebut by clear and convincing evidence the § 2254(e)(1) presumption that a state court's factual findings are correct." *Foster v. Johnson*, 293 F. 3d 766, 776-77 (5th Cir. 2002) (citation omitted), *cert. denied*, 123 S.Ct. 625 (2002); *Torres v. Prunty*, 223 F.3d 1103, 1108 (9th Cir. 2000) (stating that in order for a federal district court to conclude that a state court's factual determination was unreasonable under § 2254(d)(2), the federal court must be "left with a 'firm conviction' that the determination made by the state court was wrong and that the one [the petitioner] urges was correct"); *see also* 28 U.S.C. § 2254(e)(1).

Here, nothing in the record (or in Petitioner's submissions) suggests that the state court's factual findings were unreasonable. Further, Petitioner has failed to rebut the presumption of correctness accorded the state court's factual findings. Because he has not denigrated the state court's factual findings, the Court cannot conclude that the state court's decision was based on an unreasonable determination of the facts. Based on the foregoing, it is clear that claim eight must be denied under section 2254(d).

Claim Nine (Part I)

The substance of Petitioner's ineffective assistance of trial counsel claim is set forth as follows:

> At the guilty phase of [Petitioner's] trial, [he] was represented by Howard Pearl. Among other failures, Pearl sacrificed multiple opportunities to cross-examine key law enforcement witnesses on critical aspects of their testimony, even though numerous avenues for impeachment were available to him. Instead, Pearl bolstered the testimony of these witnesses. He also failed to adequately prepare for trial and present evidence that the shooting was reflexive, a fact which would have had significant impact at sentencing.

(Doc. No. 10 at 10H.) This claim of ineffective assistance of counsel is premised on the alleged deficient performance of Petitioner's trial counsel under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984),[9] without regard to any conflict of interest such as is alleged in claim eight. Petitioner did not raise this particular claim in the state courts.

The federal court must dismiss those claims or portions of claims that either (1) have been explicitly ruled procedurally barred by the highest state court considering the claims,[10] or (2) are not exhausted but would clearly be

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[9] In *Strickland*, the United States Supreme Court established a two part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687-88.

[10] *Harris v. Reed*, 489 U.S. 255 (1989).

barred if returned to state court.[11] Thus, "[f]ederal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law. In addition, the federal courts may not address claims that have not been presented in the state court if the state court would have found the claims to be procedurally defaulted . . . ." *Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir. 1993).[12]

The ineffective assistance of trial counsel issues set forth in part I of claim nine were not raised in the state courts, and the opportunity for raising such issues in state court has passed. Therefore, it appears that part I of claim nine is procedurally barred from consideration by this Court.

However, there are two exceptions to the procedural default bar. The first is the "cause and prejudice" exception;[13] the second, which is a narrow one, is the "actually

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[11] *See, e.g., Coleman v. Thompson*, 501 US. 722, 735 n.1 (1991) (if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991) ("[w]hen a claim is never presented to the state court *Teague* does not require that the last state court rendering judgment 'clearly and expressly' state that its judgment rests on a procedural bar.").

[12] Also, if the petitioner attempts to raise the claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir.), *cert. denied*, 513 U.S. 1061 (1994).

[13] *See Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("when a procedural default bars state litigation of a court claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and prejudice.").

innocent" exception, also known as the "fundamental miscarriage of justice" exception used in extraordinary circumstances. *See Johnson v. Singletary*, 938 F.2d 1166, 1174-75 (11th Cir. 1991), *cert. denied*, 506 U.S. 930 (1992). In the present case, Petitioner has not shown either cause or prejudice that would excuse the default. Likewise, Petitioner has not shown the applicability of the actual innocence exception. The Court has reviewed the entire record and concludes that the Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore, part I of claim nine is procedurally barred.

Claim Thirteen

Petitioner contends that the excusal for cause of a proposed juror deprived him of his constitutional rights because the proposed juror's "reservations about the death penalty would not substantially impair his performance of his duties as a juror."

During the voir dire examination of proposed juror Mr. Cameron, the following colloquy occurred:

> THE COURT: Well, you're sort of straddling a fence and you need to sort of help me out here. There's nothing wrong or right with your views. It's just we need to know where you stand; and my question to you again is, would your objections, reservation or doubts about the death penalty interfere with your ability in the first phase to objectively determine guilt or innocence
>
> MR. CAMERON: No.
>
> THE COURT: All right.
>
> MR. CAMERON: It would not.

THE COURT: Okay. Now, the second question: If the Defendant was proven guilty beyond every reasonable doubt, could you return a verdict of guilty knowing that the death penalty was a possibility

MR. CAMERON: Right now I think I could not. I might change my mind in the middle of the trial. It's a possibility.

THE COURT: Okay. You feel that you would refuse to impose the death penalty under any circumstances.

MR. CAMERON: I feel that way now.

. . . .

MS. GRAZIANO [prosecutor]: Mr. Cameron, just to make sure I understand you correctly, the way you feel right now, there are no circumstances whatsoever that you would be able to recommend the death penalty

MR. CAMERON: That's true.

. . . .

MR. PEARL [defense counsel]: Well, could you?

MR. CAMERON: I mean, I'm sure I would not recommend the death penalty.

. . . .

MR. PEARL: Well, then, I think—correct me if I'm wrong—I think what you have said is, although you're opposed to it and although you're thinking now is that you would not vote for the death penalty, that, on the other hand, there are or may be circumstances under which you would,

although you do not know what those circumstance might be at the present time?

MR. CAMERON: It's a possibility I could change my mind. That's true.

MR. PEARL: Thank you, sir.

. . . .

THE COURT: All right.

Mr. Cameron, I need a little bit more help from you. You're straddling the fence for me, and I know you're not doing that intentionally.

At this time is it your thinking that you could not, under any circumstance, impose the death penalty

MR. CAMERON: Yes, it is.

THE COURT: There is an outside chance that you could change your mind, is that correct?

MR. CAMERON: That's true, yes sir.

(Volume 5, R. 206-07, 209-11.) After hearing argument from counsel, the trial court excused Mr. Cameron. *Id.* at 212.

The Supreme Court in *Adams v. Texas*, 448 U.S. 38, 45 (1980), held that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.").

The record here clearly shows that the trial court inquired of the prospective juror as to whether he had any bias or prejudice which would prevent him from being impartial or from following the trial court's instructions. Overall, the record demonstrates that the subject of the juror's views on capital punishment was adequately addressed and that Petitioner's Sixth Amendment right to an impartial jury and an adequate voir dire were not violated. The trial judge and counsel for both sides took great pains to ascertain whether the juror could fulfill his duty to abide by the law and render an impartial verdict and sentence.

Mr. Cameron mentioned at the beginning of the inquiry that he would have difficulty rendering a guilty verdict if he knew that the death penalty was a possibility. He unequivocally stated that he knew of no circumstance whatsoever in which he would be able to recommend the death penalty. Mr. Cameron was properly discharged for cause as the record reflects that, at the time of the inquiry, his views would "substantially impair the performance of his duties as a juror." Thus, this claim is without merit.

B. Claims Pertaining to Sentencing

Claim One

The Supreme Court of Florida in *Herring IV* determined that the cold, calculated, and premeditated aggravating factor did not apply to the circumstances in his case; yet, the court found that the elimination of this factor did not compromise the weighing process of either the judge or the jury. *Herring*, 580 So.2d at 138.[14] In light of the elimina-

[14] As discussed earlier, *Herring IV* involved Petitioner's appeal of the denial of his amended second Rule 3.850 motion for postconviction relief.

tion of the aggravating factor, Petitioner argues that the Supreme Court of Florida was obligated, in accordance with applicable law from the United States Supreme Court,[15] to remand for a new sentencing hearing, to independently reweigh the aggravating and mitigating circumstances, or to make an individualized determination that the error was harmless. Because of the Supreme Court of Florida's failure to perform any of those matters, Petitioner contends that he is entitled to habeas relief.

Procedurally, it is clear that this claim is not properly reviewable in a federal habeas proceeding. A habeas petition must allege that the petitioner's detention violates the constitution, a federal statute, or a treaty. . . . [A] petition alleging errors in the state postconviction review process is not addressable through habeas corpus proceedings." *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir.), *cert. denied*, 493 U.S. 1012 (1989). In *Spradley v. Dugger*, 825 F.2d 1566 (11th Cir. 1987), the petitioner argued that the state trial court violated his due process rights when it denied his Rule 3.850 motion because it did not conduct an evidentiary hearing and because its opinion denying relief failed to attach those portions of the record on which it relied. The Eleventh Circuit Court of Appeals held that the state trial court's alleged errors in the Rule 3.850 proceedings did not undermine the validity of the petitioner's conviction; therefore, the claim went to issues unrelated to the cause of the petitioner's detention, and it did not state a basis for habeas relief. *Id.* at 1567; *see also Mitchell v. Wyrick*, 727 F.2d 773, 774 (8th Cir.) ("Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus

[15] *See, e.g., Sochor v. Florida*, 504 U.S. 527 (1992); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself.") (quotation omitted) (citation omitted), *cert. denied*, 469 U.S. 823 (1984).[16] In this claim, Petitioner alleges errors in the state postconviction review process which are not addressable through habeas corpus proceedings; consequently, it must be denied.

Alternatively, this claim is procedurally barred. Petitioner's claim is that the Supreme Court of Florida was obligated, in accordance with applicable law from the United States Supreme Court, to remand for a new sentencing hearing, to independently reweigh the aggravating and mitigating circumstances, or to make an individualized determination that the error was harmless. Petitioner never raised this claim with the state courts.

Because this claim was not raised with the state courts and the opportunity for doing so has passed, claim one is procedurally barred in this Court. Furthermore, Petitioner has not shown either (a) cause or prejudice that would excuse the default or (b) the applicability of the actually innocent exception. The Court has reviewed the entire record and concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar.[17]

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[16] In *David v. Price*, No. CIV. A. 97-7643, 1998 WL 404546, at *2 (E.D. Pa. July 15, 1998), the district court noted that "the majority of Circuits have held that . . . deficiencies [or errors in state post-conviction proceedings] are not reviewable in federal habeas proceedings." The district court also listed those circuits in the majority and the one circuit in the minority.

[17] Moreover, the Court finds that the Supreme Court of Florida correctly determined that the elimination of the cold, calculated, and premeditated aggravating factor did not compromise the weighing process of either the judge or the jury.

Claim Two

Petitioner argues that the trial court relied on his "perjury" during the guilt phase of his trial as a "non-statutory aggravating circumstance." Although not found in the trial court's written findings supporting the imposition of the death sentence, Petitioner relies on the following remarks made by the trial judge in his order denying Petitioner's first motion for postconviction relief:

> The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch" robbed and shot the clerk. Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well.

(Volume 12, R. 162-63.) According to Petitioner, the "judge concluded that Herring's perjury—a non-statutory aggravating circumstance—constituted an adequate basis to 'doom' Herring." (Doc. No. 11 at 31.)

The trial court made these statements in dealing with Petitioner's claim that he received ineffective assistance of counsel because counsel told the jury not to consider the age of Petitioner as a mitigating factor. The trial court certainly did not determine that it had imposed a "perjury" aggravator at sentencing or otherwise disclose any reliance on a "perjury" aggravator at sentencing. The trial court merely discussed the realities of Petitioner's trial in the context of the ineffective assistance of counsel claim. Petitioner's claim has no factual basis and is without merit.[18]

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[18] Additionally, this Court notes that the Supreme Court of Florida determined that this claim was procedurally barred. *See Herring*, 501

Claim Three

Petitioner avers that "the State courts erroneously applied the avoidance of arrest aggravating circumstance in violation of the Eighth and Fourteenth Amendments." (Doc. No. 11 at 37.) The trial court found as an aggravating circumstance that "[t]he crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (Volume 1, R. 74.) The trial court "accept[ed] Detective Varner's testimony wherein the Defendant said he fired the second shot into Norman Dale Hoeltzel because he was still alive and the Defendant did not want a witness to the crime." *Id.* Petitioner counters as follows:

> In Herring's case, the overwhelming evidence demonstrates that the clerk was shot reflexively in a robbery gone bad. The sole basis for applying the avoidance of arrest aggravating circumstance was Varner's uncorroborated testimony that Herring shot the clerk twice to eliminate a witness. Even taking Varner's testimony into

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So.2d at 1279. However, it is not clear that the claim is procedurally barred because Petitioner would not have obtained knowledge of the matter until after the trial judge issued the order denying the motion for postconviction relief. It appears that the Supreme Court of Florida's reasoning with regard to this matter involves the finding that Petitioner should have raised any sentencing matters on direct appeal.

In the event that there is a procedural bar, Petitioner has not shown either cause or prejudice that would excuse the default. Likewise, Petitioner has neither alleged nor shown the applicability of the actually innocent exception. The Court has reviewed the entire record and concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar.

> account, the overwhelming weight of evidence demonstrates that witness elimination was not the dominant or sole motive of the killing.

(Doc. No. 11 at 43.)

This claim was raised on direct appeal, and the Supreme Court of Florida found as follows:

> The evidence in the record is uncontroverted that the appellant shot the clerk while he was standing behind the counter and shot him again after he had fallen to the floor. There was also testimony from a detective that appellant stated that he "shot a second time to prevent him [the clerk] from being a witness against him." This evidence is, in our view, sufficient to establish the appellant's intent to kill the store clerk in order to eliminate him as a witness.

Herring, 466 So.2d at 1056.

Petitioner's claim is precluded by section 2254(d). In considering this claim, the Supreme Court of Florida did not apply a rule that contradicted the governing law set forth in the cases of the United States Supreme Court. Furthermore, there is no indication that the result reached by the state court was at odds with any United States Supreme Court case which considered "materially indistinguishable facts." Finally, the state court's application of the clearly established law regarding this claim was objectively reasonable.

In fact, the evidence presented at trial showed that Officer Dozell Varner, Jr. testified that Petitioner confessed to him that he shot the store clerk the first time in the head and the second time while the store clerk was lying on the floor. (Volume 6, R. 416-17.) Petitioner did this to prevent

the store clerk from being a witness against him. *Id.* at 417. Additionally, Petitioner, in his taped confession, admitted shooting the victim twice.[19] Petitioner first shot the victim in the head while he was standing behind counter and then shot him again in the head after the victim had fallen to the floor. (Volume 2, R. 73-74.)

Moreover, in *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990), the United States Supreme Court stated that "in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eight Amendment violation, we think the more appropriate standard of review is the 'rational factfinder' standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.3d 560 (1979)." The inquiry set forth in *Jackson* concerns "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic fact to ultimate facts." *Jackson*, 443 U.S. at 319 (citation omitted).

Applying the *Jackson* standard, the Court determines that a rational factfinder could have found the aggravating circumstance. As discussed above, there was evidence that Petitioner shot the victim twice and that the second shot was done in order to prevent the victim from being a witness against Petitioner. Based on the foregoing, it is clear

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[19] The taped confession was played during the guilt phase testimony of Detective Marvin White. (Volume 6, R. 425.)

that this claim must be denied under section 2254(d). Therefore, this claim is without merit.[20]

Claim Four

Petitioner argues that his death sentence resulted from the improper doubling of aggravating circumstances. In particular, according to Petitioner, the trial judge erroneously applied both the fifth and ninth statutory aggravating circumstances on the basis of a single fact: the firing of a second shot.[21]

Petitioner raised this claim in his first motion for post-conviction relief, and both the trial court and the Supreme Court of Florida found it to be procedurally barred because it should have been raised on direct appeal. The Court finds that this claim is procedurally barred because it has been explicitly ruled procedurally barred by the highest state court considering the claim. Petitioner has not shown either cause or prejudice that would excuse the default. Likewise, Petitioner has neither alleged nor shown the applicability of the actually innocent exception. The Court has reviewed the entire record and concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar.[22]

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[20] The Court finds that Petitioner has failed to demonstrate, beyond conjecture, that the shots were fired reflexively in rapid succession or that Officer Varner's testimony was unreliable.

[21] At times, Petitioner inadvertently refers to the *sixth* statutory aggravating circumstance; however, it is apparent that Petitioner is challenging the fifth and the ninth statutory aggravating circumstances.

[22] The Court also rejects Petitioner's argument that appellate counsel was ineffective for failing to raise this matter on direct appeal and constituted cause for the procedural bar. The United States Supreme Court has recognized that a claim of ineffective assistance of counsel

Furthermore, the Court notes that in *Herring IV*, which disposed of Petitioner's second Rule 3.850 motion for postconviction relief, the Supreme Court of Florida specifically determined that the cold, calculated, and premeditated aggravating factor was no longer applicable. *Herring*, 580 So.2d at 138. The court then determined as follows:

> Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury

Id. Consequently, the cold, calculated, and premeditated aggravating factor was removed from the balance, and the

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may support a finding of cause, but only if counsel's performance was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Thus, in order for ineffective assistance of counsel to serve as cause for a procedural default, a petitioner must be able to satisfy the exacting standards of *Strickland*. *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002). If Petitioner "cannot prevail on a separate ineffective assistance of counsel claim, then he cannot prevail on an argument that ineffective assistance caused the procedural default." *Id.*

In the present case, in light of the fact that in *Herring IV* the Supreme Court of Florida removed the cold, calculated, and premeditated aggravating factor from the sentencing analysis, Petitioner is unable to show prejudice. Since Petitioner cannot demonstrate that his appellate counsel was ineffective regarding this claim, he has not demonstrated cause or prejudice to overcome the procedural bar.

Supreme Court of Florida still found that Petitioner was not entitled to a new sentencing hearing.[23]

Claims Five, Six, and Seven

Petitioner argues that the state trial court erred in admitting Officer Mary White's testimony because (a) Petitioner was not given *Miranda*[24] warnings prior to his interview with her (claim five); (b) his due process rights were violated when the State surprised defense counsel with the use of the testimony (claim six); and (c) the testimony improperly injected racial bias into the sentencing proceeding and was motivated by impermissible racial considerations (claim seven).

Petitioner did not raise these three claims in his direct appeal; however, he did raise them in his first Rule 3.850 motion.[25] The state trial court determined that the claims were procedurally barred, and the Supreme Court of Florida in *Herring II* agreed. *Herring*, 501 So.2d at 1279-80. Since the last state court rendering a judgment in Petitioner's case clearly and expressly stated that its judgment rested on the procedural bar, claims five, six, and seven are

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[23] The Supreme Court of Florida's treatment of this matter was not constitutionally infirm. *See Parker v. Dugger*, 498 U.S. 308, 319 (1991) ("In a weighing State, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis.")

[24] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[25] Petitioner did file a state petition for writ of habeas corpus arguing that his appellate counsel was ineffective for failing to raise the substance of these three claims on direct appeal. *See* Appendix 14. He has raised a similar ineffective assistance of counsel claim in the instant habeas petition (claim ten), which will be discussed below.

procedurally barred in this Court. *Tower*, 7 F.3d at 210 ("Federal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law.").

In order to overcome this procedural bar, Petitioner must demonstrate the applicability of one of the two exceptions: cause and prejudice or a fundamental miscarriage of justice. Petitioner argues that he received ineffective assistance of appellate counsel regarding these three claims, which constitutes cause excusing the procedural default. He further argues that this ineffective assistance of counsel prejudiced his case.

As discussed earlier, a claim of ineffective assistance of counsel may support a finding of cause only if counsel's performance was "so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Before ineffective assistance of counsel may serve as cause for a procedural default, the petitioner must be able to satisfy the two elements of the *Strickland* analysis. *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002). Thus, if Petitioner "cannot prevail on a separate ineffective assistance of counsel claim, then he cannot prevail on an argument that ineffective assistance caused the procedural default." *Id.*

Petitioner's claims of ineffective assistance of appellate counsel are inadequate to constitute cause to overcome the procedural bar. As set forth in the discussion of claim ten, Petitioner has failed to demonstrate that his appellate counsel rendered ineffective assistance for failing to argue that Petitioner's statement to Officer White was obtained in violation of his constitutional rights and the use of the testimony violated both his federal constitutional rights and the Florida Rules of Criminal Procedure. Therefore,

Petitioner has not established cause to overcome the procedural default, and claims five, six, and seven are barred from consideration by this Court.

Claim Nine (Part II)

Petitioner contends that he received ineffective assistance of counsel at sentencing because of the following: 1) counsel failed to investigate or present readily available mitigating evidence; 2) counsel failed to present mitigating evidence of Petitioner's mental and emotional condition; 3) counsel failed to contest the existence of the heightened premeditation aggravating circumstance; 4) counsel failed to object to the trial court's jury instruction on the avoidance of arrest aggravating circumstance; 5) counsel's lack of skill resulted in the admission of highly prejudicial testimony; 6) counsel's ignorance of the evidentiary rules resulted in the admission of highly prejudicial testimony; 7) counsel's ignorance of the evidentiary rules and of applicable authorities resulted in the exclusion of mitigating evidence; and 8) counsel instructed the jury to disregard a significant mitigating statutory circumstance.

1. *Petitioner's Claim Must Be Denied Based on Section 2254(d)*

This claim was raised in Petitioner's motion for postconviction relief, and the trial court found that all of the underlying issues were without merit.[26] The Court finds

[26] The Supreme Court of Florida, in its opinion affirming the trial court's denial of Petitioner's motion for postconviction relief, held that "[t]he trial judge, in an extensive order, fully explained why each of the ineffective assistance-of-counsel claims did not meet the test set forth in *Strickland*.... We agree with the trial judge's findings and commend him for his detailed explanation." *Herring*, 501 So.2d at 1280.

that, based on section 2254(d), Petitioner is not entitled to relief. In particular, the adjudication of the claim by the state court did not result in a decision 1) that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or 2) that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. At the outset, the Court notes that in assessing Petitioner's ineffective assistance of counsel claim, the state trial court utilized the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, there is no indication that the result reached by the state court was at odds with any United States Supreme Court case which considered "materially indistinguishable facts." Finally, a review of the record reveals that the state court's application of the clearly established law regarding this claim was objectively reasonable. Based on the foregoing, it is clear that this claim must be denied under section 2254(d).

2. *Issue One*

Petitioner argues that counsel failed to present any evidence in mitigation and that he should have obtained documentary evidence regarding Petitioner's mental disability and serious emotional problems. Petitioner identifies a report detailing Petitioner's psychological and emotional problems while at the Wiltwyck School and character witnesses who would have testified on his behalf.

As to issue one, the trial court denied it based on the following: 1) at least one of the reports resulted from an interview done when Petitioner was 13 years old; 2) Petitioner's counsel was able to establish learning disabilities and psy-

chological problems through the testimony of Petitioner's mother; 3) one of the reports established that Petitioner's mother did not keep Petitioner's appointments with the counselor; and 4) the reports reflect that Petitioner was of dull normal intelligence.

The record supports the trial court's findings, and the Court agrees that Petitioner has not shown that his counsel's performance was deficient or that he sustained prejudice. The Court notes that one of the reports resulted from an evaluation performed when Petitioner was 12 years old and that another report described Petitioner as having "intellectual functioning in the dull normal range." The latter report was based on an evaluation done on January 21, 1974, and found Petitioner to have full scale IQ of 81. Moreover, Petitioner's mother testified at sentencing that petitioner was a "hyperactive child diagnosed by the doctor, with very low IQ of 80, learning disability." (Volume 7, R. 782.) She also testified that Petitioner was treated for psychological problems as a child. *Id.*

3. *Issue Two*

Petitioner argues that counsel failed to introduce two psychological reports that diagnosed him as suffering from retardation and other organic neurological disorders. Petitioner identifies two reports from St. Luke's Hospital in New York City, which concern evaluations performed on Petitioner when he was 12 and 13 years old.

The trial court addressed this issue and found it to be without merit. The trial court noted that counsel did present testimony from Petitioner's mother, which revealed that his home-life was poor; that his parents divorced when he was four years old; that he had psychological problems; that he was hyperactive with a low IQ and a learning disability; and that she loved him. The trial court found that

the reports would have been cumulative to the mother's testimony.

The record supports the trial court's findings, and the Court agrees that Petitioner has not shown that his counsel's performance was deficient or that he sustained prejudice. The Court notes that Petitioner's mother specifically testified at the penalty phase hearing as to Petitioner's low IQ and learning disabilities and as to Petitioner's poor home-life. The report would have been cumulative to her testimony. The Court also notes that one of the reports actually suggests that Petitioner had normal intellectual abilities: "There is also a discrepancy between Ted's intellectual abilities, *albeit at a Dull-Normal range*, and his actual achievement." (Volume 12, R. A-116-17.)

4. *Issue Three*

Petitioner contends that counsel should have challenged the cold, calculated, and premeditated aggravating circumstance. The trial court addressed this issue and found it to be without merit. The trial court noted that Petitioner denied involvement in the shooting, claiming that another person committed the murder.

The Court notes that the Supreme Court of Florida in *Herring IV* found that the cold, calculated, and premeditated aggravating factor no longer applied to Petitioner's case; yet, the Supreme Court found that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in Petitioner's sentencing. In light of Petitioner's denial of involvement in the murder and the Supreme Court of Florida's determination in *Herring IV*, the Court finds that Petitioner has not shown that counsel's performance was unreasonable or that he sustained prejudice.

5. *Issue Four*

Petitioner argues that counsel should have objected to the jury instruction on the avoidance of arrest aggravating circumstance. According to Petitioner, the trial court failed to advise the jury that it could only impose this aggravating circumstance if it concluded beyond a reasonable doubt that eliminating a witness was the dominant or sole motive for the killing.

This issue was not raised with the state courts. The Eleventh Circuit Court of Appeals held that the procedural bar doctrine applies to ineffective assistance of counsel claims brought in habeas cases: "a habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously." *Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992) (footnote omitted). In the present case, Petitioner has not shown either cause or prejudice that would excuse the default. Likewise, Petitioner has neither alleged nor shown the applicability of the actually innocent exception. The entire record has been reviewed, and the Court concludes that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Therefore, issue four is procedurally barred and must be denied.

Additionally, Petitioner has not shown that the jury instruction was improper or deficient. At the penalty phase hearing, the trial court instructed the jury as to the various aggravating circumstances to be considered, including that "[t]he crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing the lawful arrest or effecting excape [sic] from custody." (Volume 7, R. 817.) There has been no showing that coun-

sel had a legitimate basis for objecting to this instruction or that Petitioner suffered prejudice.

6. *Issue Five*

At the penalty phase hearing, the State called Mary White as witness. Ms. White was a Probation and Parole Officer, and Petitioner allegedly told her that the victim "got what he deserved." (Volume 7, R. 758.) The State wanted to introduce this testimony in order to show Petitioner's "lack or remorse and his feeling towards what happened [which] certainly go to the nature of the crime and the character of the Defendant." *Id.* Petitioner's counsel objected on the following bases: 1) there was no showing that Petitioner was advised of his constitutional rights prior to making the statement; 2) counsel was not provided with the incriminating statements prior to trial; and 3) relevant Florida case law precluded the introduction of such statements. *Id.* at 758-59.

Petitioner argues that counsel was unable to present cogent arguments to the trial court with regard to the relevant Florida case law. Petitioner's counsel argued that, under Florida case law, "lack of remorse is an unenumerated aggravating circumstance[,] [a]nd testimony, as to that, shall not be presented." *Id.* at 766. However, the trial court, relying on *Sireci v. State*, 399 So.2d 964 (Fla. 1981), determined that the testimony was admissible.

In *Sireci*, the Supreme Court of Florida held that "[w]hile lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel." *Id.* at 971. Here, the trial court found that the lack of remorse was not a separate aggravating factor; rather, it was being

put into the equation of whether the crime was specially heinous, atrocious, or cruel. (Volume 7, R. 768.) According to Petitioner, counsel should have argued that the specially heinous, atrocious, or cruel aggravating factor had not been invoked in Petitioner's case and was irrelevant to the facts of Petitioner's case.

The trial court found that Petitioner had not established ineffective assistance of counsel based on the following: 1) although Petitioner's counsel "did not cite proper case law," he did object to and oppose Ms. White's testimony, and 2) "the State had yet to concede that the murder was not heinous, atrocious, and cruel." (Volume 12, R. A-161.)

The Court agrees with the state trial court. It is clear that Petitioner's counsel raised objections to Ms. White's testimony apart from the relevant Florida case law. Additionally, Petitioner's counsel did argue that Florida case law precluded Ms. White's testimony, albeit he did not specifically argue against the applicability of the *Sireci* decision. Finally, it appears that the trial court correctly relied on the *Sireci* decision since, at the time of the ruling, the heinous, atrocious, and cruel aggravating factor was still viable. Therefore, the Court finds that counsel's performance was reasonable and that Petitioner has not shown prejudice.

7. *Issue Six*

At the penalty phase hearing, as previously discussed, Petitioner's mother, Dorothy Meyers, testified on his behalf. During her direct examination, counsel asked her about Petitioner's childhood, and she mentioned that, at some point, Petitioner was sent to Florida. (Volume 7, R. 782.) During cross-examination, the prosecutor asked her why Petitioner was sent to Florida, and specifically questioned her as to whether he was sent to Florida

because of his involvement in drug dealing. *Id.* at 788-89. She mentioned that Petitioner's "life was in danger because, if he would testify against the drug dealers, his life was in danger." *Id.* at 788. Petitioner's counsel did not object to this line of questioning, and Petitioner argues that counsel was deficient for failing to do so on the basis that it was outside the scope of the direct examination.

The trial court denied this argument, finding that "the door was opened to this cross because on direct the mother testified she sent [Petitioner] to Florida. . . ." (Volume 12, R. A-161.) Consequently, the prosecutor was permitted to ask why Petitioner was sent to Florida, and an objection to this line of questioning would have been overruled.

The Court agrees with the findings of the trial court. Under Florida law, questions on cross-examination may relate to the matters brought out on direct examination. *See, e.g., Coco v. State*, 62 So.2d 892 (Fla.1953). In the present case, the prosecutor's questions as to why Petitioner was sent to Florida certainly related to matters brought out on direct examination. The door was opened when she testified on direct examination about Petitioner moving to Florida. An objection would have been overruled. Thus, counsel was not deficient with regard to this matter, and Petitioner has not shown prejudice.

8. *Issue Seven*

This issue consists of two parts, both of which relate to matters that Petitioner's counsel unsuccessfully attempted to introduce at the penalty phase hearing. First, during closing argument, Petitioner's counsel sought to read poems which were written by Petitioner as a child and which were set forth in a report from St. Luke's Hospital Center. The prosecutor's objection was sustained. Peti-

tioner argues that counsel was deficient by failing to properly introduce the poems into evidence.

Second, at the beginning of the penalty phase hearing, Petitioner's counsel requested that he be allowed to call certain witnesses who were going to testify as to similar factual criminal cases in which the defendants did not receive the death penalty. (Volume 7, R. 763.) These witnesses were attorneys who represented defendants in similar factual criminal cases in the same court. The prosecutor objected, and the trial court sustained the objection. *Id.* at 766. Petitioner argues that counsel failed to argue the appropriate law allowing such testimony.

The trial court addressed these matters and found them to be without merit. As to the poems, the trial court determined that there was no prejudice since the poems were based on popular songs and since the report containing the poems also mentioned that Petitioner's mother did not keep appointments, which would have contradicted her testimony that she did all she could for Petitioner. (Volume 12, R. A-160.) The record supports the trial court's findings, and the Court agrees that Petitioner has not shown he sustained prejudice. The poems did contain quotes from popular songs, and the subject report did indicate that Petitioner's mother was not keeping appointments.

As to the testimony of the attorneys, the trial court found that such testimony simply was not admissible. (Volume 12, R. A-162) The Court agrees. Petitioner relies on *Lockett v. Ohio*, 438 U.S. 586 (1978), for the proposition that a defendant has a constitutional right to offer virtually any mitigating evidence at the penalty phase.

In *Lockett*, the Supreme Court held as follows: "We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in and all but the rarest kind of capital

case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (footnote omitted) (emphasis in original). However, there was no indication whatsoever that the Supreme Court included within that frame-work the admission of testimony from defense counsel for other first-degree murder defendants concerning the life sentences their clients received for similar crimes. As noted by the Supreme Court of Florida, "[e]valuating the sentence of other defendants in unrelated crimes involves a number of variables." *Herring*, 446 So.2d at 1049. In any event, the Court notes that Petitioner's counsel did raise the argument with the trial court, albeit unsuccessfully. Under the circumstances, the Court finds that Petitioner has not shown that counsel's performance was unreasonable or that he sustained prejudice.

9. *Issue Eight*

Petitioner avers that his counsel improperly argued during closing argument that the jury should disregard Petitioner's age as a statutory mitigating factor.

During closing argument at the penalty phase, Petitioner's counsel argued as follows:

> The other one that [the prosecutor] talked about, that Dale Hoeltzel was a participant in the crime, certainly doesn't apply. He did not, Ted Herring did not have an accomplice. The age of the Defendant is one. That certainly *does not apply*. Ted Herring was nineteen years old at the time this homicide was committed. He's twenty now. [The prosecutor] suggested that that's an aggra-

> vated circumstance [sic] because he will be considered possibly for parole when he's forty-five. That's not an aggravated circumstance. Those are the only ones you should consider. Those on the list. He's nineteen years old. In fact, those of you heard the testimony about his mother, how much learning he's had what his IQ is. He's really about thirteen or fourteen years old. *And that is a very definite mitigating circumstance in this case you have to consider.*

(Volume 7, R. 812) (Emphasis added). Petitioner relies on counsel's statement that Defendant's age "certainly does not apply." The trial court denied this issue, finding that counsel did in fact argue that age was a mitigating factor. In fact, the trial court found Petitioner's age to be a mitigating factor at sentencing.

The Court agrees with the trial court's findings. It is clear that Petitioner's counsel did argue that Petitioner's age was a mitigating factor, insisting that it was a "very definite mitigating circumstance." It is possible that the word "not" was an error in transcription or that Petitioner's counsel misspoke. In any event, the Court finds that Petitioner has not shown that counsel's performance was deficient or that he sustained prejudice.

10. *Issue Nine*

Petitioner next contends that his counsel was inexperienced, lacked appropriate legal knowledge, and did not adequately investigate the case. It does not appear that this issue was raised in the state courts, and it is procedurally barred. Petitioner has not shown the existence of any of the factors to excuse the procedural bar. Alternatively, this issue seems to be a reiteration of some of the issues previ-

ously discussed. For the reasons discussed above, the Court determines that this issue likewise is without merit.

Claim Eleven

Petitioner avers that the jury instructions regarding the imposition of the death penalty were constitutionally inadequate. Specifically, Petitioner contends that the charge to the jury was confusing, incomplete, and ambiguous, leaving the jurors ignorant as to how they were to weigh the various factors in reaching a decision.

Petitioner did not raise this claim in his direct appeal; however, he did raise it in his first Rule 3.850 motion.[27] The state trial court determined that the claim was procedurally barred, and the Supreme Court of Florida in *Herring II* agreed. *Herring*, 501 So.2d at 1279-80. Since the state appellate court clearly and expressly determined that this claim was procedurally barred, it is also procedurally barred in this Court. *Tower*, 7 F.3d at 210 ("Federal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law.").

In order to overcome this procedural bar, Petitioner must satisfy one of the two exceptions: cause and prejudice or a fundamental miscarriage of justice. Petitioner argues that he received ineffective assistance of trial and appellate counsel regarding this claim, which constitutes cause excusing the procedural default. He further argues that this ineffective assistance of counsel prejudiced his case.

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[27] Petitioner filed a state petition for writ of habeas corpus arguing that his appellate counsel was ineffective for failing to raise the substance of this claim on direct appeal. *See* Appendix 14. He has raised a similar ineffective assistance of appellate counsel claim in the instant habeas petition (claim ten), which is discussed below.

As discussed earlier, a claim of ineffective assistance of counsel may support a finding of cause if counsel's performance was "so ineffective as to violate the Federal Constitution." *Edwards*, 529 U.S. at 451. Thus, in order for ineffective assistance of counsel to serve as cause for a procedural default, a petitioner must be able to satisfy the exacting standards of *Strickland*. In addition, the claim of ineffective assistance of counsel have been "presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 489. A procedurally defaulted claim of ineffective assistance of counsel may not serve as cause to overcome the procedural bar of a separate claim, unless Petitioner can satisfy the cause and prejudice standard with respect to the ineffective assistance of counsel claim. *Edwards*, 529 U.S. at 453.

Petitioner's claims of ineffective assistance of trial and appellate counsel are inadequate to constitute cause to overcome the procedural bar. As set forth in the discussion of claim nine, part I, Petitioner's ineffective assistance of trial counsel claim was not raised in the state courts as a separate, independent claim. Moreover, as discussed with regard to claim ten, Petitioner has failed to demonstrate that his appellate counsel rendered ineffective assistance regarding the jury instruction claim. Therefore, Petitioner has not established cause to overcome the procedural default, and claim eleven is barred from consideration by this Court.

Claim Twelve

Petitioner, relying on *Lockett v. Ohio*, 438 U.S. 586 (1978), argues that the trial court should have allowed his counsel "to introduce the testimony of counsel for defen-

dants in three different cases where a life sentence was imposed for a crime of a magnitude similar to that involved in *Herring*'s case."

This matter was discussed earlier with regard to an issue of ineffective assistance of counsel raised by Petitioner. In *Lockett*, the Supreme Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (footnote omitted) (emphasis in original). However, there was no indication whatsoever that the Supreme Court's decision extended to the admission of testimony from defense counsel for other first-degree murder defendants concerning the life sentences their clients received for similar crimes. As noted by the Supreme Court of Florida, "[e]valuating the sentence of other defendants in unrelated crimes involves a number of variables." *Herring*, 446 So.2d at 1049. The Court finds that this claim must be denied.

C. Other Claims

Claim Ten

Petitioner argues that he received ineffective assistance of counsel because his appellate counsel failed to raise the following claims on direct appeal: 1) that the testimony of the probation officer violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; 2) that the admission of Petitioner's confession into evidence violated his Fifth, Sixth, and Fourteenth Amendment rights; 3) that during her closing argument to the jury at the sentencing phase,

the prosecutor improperly suggested that Petitioner might be granted parole if given life imprisonment; 4) that the trial court impermissibly applied both the heightened premeditation and the witness elimination aggravating circumstances on the basis of the same aspect of the shooting; and 5) that the jury instructions regarding the imposition of the death penalty were constitutionally inadequate.

1. *Petitioner's Claim Must Be Denied Based on Section 2254(d)*

Petitioner raised these five issues in the petition for writ of habeas corpus he filed in the Florida Supreme Court. After the State filed a response to the petition, the Florida Supreme Court denied the habeas petition, finding that the issues were meritless. *Herring v. Dugger*, 528 So.2d 1176 (Fla. 1988).

Because the state court adjudicated these issues on the merits, this Court may grant habeas corpus relief only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court law or was based on an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d)(1) and (2). In reaching its determination, the state court applied the *Strickland* standard for ineffective assistance of counsel, which is the proper governing legal principle. *See Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992); *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). Petitioner has not identified any Supreme Court case with "materially indistinguishable" facts which reaches a different conclusion. Therefore, the decision was not contrary to clearly established law.

As discussed below, Petitioner has failed to demonstrate that the state court's application of the *Strickland* standard

was objectively unreasonable or that the state court made an unreasonable determination of the facts. Consequently, it is clear that claim ten must be denied under section 2254(d).

2. *Issue One*

During the sentencing phase of Petitioner's trial, a state probation officer testified that Petitioner told her that the victim "got what he deserved due to the fact, that, him trying to play hero. And that it was just one less cracker." (Volume 7, R. 777-78.) Petitioner contends that this statement was obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that the surprise use of this testimony violated both his federal constitutional rights and Florida Rule of Criminal Procedure 3.220. According to Petitioner, appellate counsel should have raised these challenges on direct appeal.

With regard to this issue, the state habeas corpus made the following findings of fact:

> Herring was initially arrested for possession of a stolen car at approximately 11:30 a.m. on June 12, 1981. The arresting officer advised Herring that he had the right to remain silent and to have an attorney. Herring was immediately transported to the Volusia County jail, where he was questioned and advised of his *Miranda* rights. Herring then executed a written waiver of his rights. Herring did not become a suspect in the homicide until his appearance in a police lineup later that afternoon. Questioning regarding the homicide lasted several hours, during which time he con-

> fessed to the homicide. While Herring was in custody, he was repeatedly advised of his rights.
>
> * * *
>
> After Herring had been taken into custody and signed the *Miranda* rights waiver, but while he was still in the county jail, Herring spoke to a probation officer. During the penalty phase, over defense counsel's objection, the probation officer testified that she talked with Herring regarding "the murder of one Dale Hoeltzel at 205 South Ridgewood, Daytona Beach, Florida." She stated, "[Herring] indicated to me that the young man got what he deserved due to the fact that, him trying to play hero. And that it was just one less cracker."

(Volume 14, June 23, 1988, Opinion Denying Habeas at 2-4.) The factual findings of the state habeas corpus court are presumed to be correct, unless Petitioner rebuts such presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(l).

Petitioner contends that the state court "erroneously assumed that Herring was at the 'same' place of custody where he was advised of his *Miranda* rights for the first time . . . [and] that [the probation officer's] custodial interrogation of Herring and his initial interrogation at the Daytona Beach police station were 'not remote' in time." (Doc. No. 20 at 68-69.) According to Petitioner, the State conceded at oral argument that the probation officer's conversation with Petitioner *may have* taken place as long as seventeen days after his transfer to the Volusia County jail. Petitioner also argues that his last *Miranda* warning was issued at the Daytona Beach police station, rather than the

Volusia County jail, where the conversation with the probation officer took place. However, Petitioner does not provide record cites or any other evidence to support this statement. *See* Doc. No. 20 at 69. Petitioner's speculation regarding the timing and conclusory allegations regarding the location of the conversation are insufficient to rise to the level of "clear and convincing" evidence that would overcome the presumption of correctness afforded the state court's factual findings.

More importantly, Petitioner has not demonstrated that the admission of the statement prejudiced him. In the trial judge's findings regarding application of the death penalty, the statement was considered in connection with the "wicked, evil, atrocious, or cruel" aggravating circumstance. (Appendix Volume 1 at 74.) The trial judge stated that "[t]his circumstance comes close to being established. The Defendant gave no indication of any remorse during the trial. In fact, probation officer Mary White testified Defendant stated the death of Norman Dale Hoeltzel meant 'one less cracker.' Lack of remorse can be considered in determining this criteria. Still this Court believes however brutal and senseless this crime is, it does not meet this extreme criteria." *Id.* (citation omitted). Thus, the admission of the testimony did not impact the determination of Petitioner's sentence. Since Petitioner cannot demonstrate prejudice, this issue must be denied. *Alvord v. Wainwright*, 725 F.2d 1282, 1289-90 (11th Cir.) (holding that when no prejudice shown, there is no need to address a claim that counsel was deficient), *cert. denied*, 469 U.S. 956 (1984).

3. *Issue Two*

Petitioner also believes that appellate counsel should have argued that the admission of Petitioner's confession into evidence at trial violated his constitutional rights. According to Petitioner, his "purported waiver of his [*Miranda*] rights was ineffective because he was advised that he would be questioned about one crime and was subsequently interrogated about other, more serious crimes." (Doc. No. 11 at 167.) In support of this contention, Petitioner states "upon being given the waiver form, Herring specifically asked 'what he was being charged with,' and he was advised that 'he was being charged at that time for grand theft for possession of a stolen vehicle.' Herring's consent was thus limited to questioning relating to the stolen vehicle." *Id.*

Petitioner filed a motion to suppress his confession (Volume 1, R. 12), which the state trial court denied after conducting an evidentiary hearing. *Id.* at 13. A review of the record reveals that appellate counsel did not perform unreasonably regarding this claim, and Petitioner was not prejudiced by the exclusion of this claim on appeal.

The arresting officer testified that he advised Petitioner of his rights at the time of the arrest, that Petitioner indicated that he understood the rights, and that he had no further conversation with Petitioner. (Volume 3, January 15, 1982, Suppression Hearing at 5-6.) The officer then transported Petitioner to the Daytona Beach police department and turned him over to Detectives Anderson and Varner. *Id.* at 6-7.

Detective Anderson testified that after Petitioner arrived at the police department he was again advised of his rights, and signed a waiver form. *Id.* at 10-15. According to Detective Anderson, Petitioner "wanted to know more or

less what was going on, what he was being charged with, and, that's about it. . . . [W]e told him he was being charged at that time for grand theft for possession of a stolen vehicle." *Id.* at 15. Petitioner did not indicate that he wanted to speak with a lawyer and did not indicate in any way that he did not wish to respond to the detectives' questions. *Id.* at 16-17.[28]

The detectives initially questioned Petitioner about why he was in possession of a stolen vehicle. *Id.* at 16. They next inquired about some other robberies that had taken place in the city. *Id.* 17. Petitioner was then taken for a live lineup, after which he confessed to several of the robberies. *Id.* Petitioner also stated that he had been in the convenience store where the homicide occurred. According to Petitioner, he had intended to rob the store, but before he could, another black male robbed and shot the victim. *Id.* at 18. This statement was recorded on audiotape. (Volume 3, January 22, 1982, Confession Suppression Hearing Transcript at 11.) On tape, Petitioner again acknowledged that he had been advised of his rights. *Id.* at 12, 49-50, 51. Approximately one hour later, Petitioner confessed to shooting the victim in the instant case. *Id.* The confession was also audiotaped. *Id.* at 73-76. During the confession, Petitioner again acknowledged that he was not threatened or coerced to make the statements, that he did not request an attorney, and that he consented to the making of the tape. *Id.* at 74-75.

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[28] After Petitioner executed the waiver form, a third detective, Detective White, arrived in the interrogation room. Upon his arrival, Detective White asked Petitioner again if he understood his rights and if he wanted an attorney; Petitioner said no. (Volume 3, January 15, 1982, Suppression Hearing at 24; January 22, 1982, Confession Suppression Hearing Transcript at 6.)

Petitioner testified at the suppression hearing. He admitted that he had read and signed the waiver of rights form and that he had told the detectives that he understood his rights. *Id.* at 42. At no time during his testimony did Petitioner ever indicate that he had intended to limit his waiver of rights to only certain subjects. *See id.* at 36-48.

The record clearly reflects that Petitioner was thoroughly and repeatedly advised of his constitutional rights. He knowingly, voluntarily, and intelligently waived those rights and made inculpatory statements to the detectives. Petitioner did not seek to limit the waiver in any manner. The trial court properly concluded that Petitioner's taped confession was admissible at trial. Petitioner has failed to demonstrate that his appellate counsel's decision not to raise this issue on appeal was in any manner deficient or caused him any prejudice. This issue must be denied.

4. *Issues Three, Four, and Five*

Petitioner's trial counsel did not object to the prosecutor's alleged improper closing argument, the doubling of aggravating factors, or the death penalty jury instructions. Since no objections were made at trial, issues three, four, and five were not preserved for review on appeal. *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978) ("[E]ven constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court."), *overruled in part, State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). Despite Petitioner's contentions, the alleged deficiencies did not constitute fundamental error. Appellate counsel was not ineffective for failing to raise these three issues, and Petitioner has not demonstrated that he was prejudiced by the omission. Issues three, four, and five must be denied.

Any of Petitioner's allegations not specifically addressed herein have been determined to be without merit.

IV. CONCLUSION

The Court determines that the petition must be denied and that this case must be dismissed.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. The Petition for Writ of Habeas Corpus filed by petitioner, Ted Herring, is DENIED, and this case is DISMISSED WITH PREJUDICE.

2. The Clerk of the Court shall enter judgment dismissing this action and is directed to close this case.

DONE AND ORDERED at Orlando, Florida, this 14th day of April, 2003.

/s/ G. KENDALL SHARP
G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
pslc 4/11
All Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE No. 6:99-cv-1413-Orl-18KRS
RECEIVED JUNE 20, 2003

TED HERRING,

Petitioner,

v.

DENNIS T. O'NEIL, et al.,

Respondents.

ORDER

This case is before the Court on the following motion: Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

MOTION:	PETITIONER'S AMENDED APPLICATION FOR CERTIFICIATE OF APPEALABILITY (Doc. No. 43)
FILED:	June 9, 2003
THERON it is ORDERED that the motion is DENIED.	

DONE AND ORDERED in Chambers at Orlando, Florida this 18 day of June, 2003.

/s/ G. KENDALL SHARP
G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
pslc 6/11
Counsel of Record
USCA 03-12598-P

[LETTERHEAD]
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
of Case And Names of Parties

August 21, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 03-12598-P Ted Herring v. Secretary, Department of Correction
DC DKT NO.: 99-01413 CV-ORL-18KRS

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

APPELLANT'S BRIEF IS DUE FOR FILING ON OR BEFORE SEPTEMBER 30, 2003.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Joyce Pope (404) 335-6200

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12598-P

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

AUG 21 2003

THOMAS K. KAHN,
CLERK

TED HERRING,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before BIRCH, DUBINA, and BLACK, Circuit Judges.

BY THE COURT:

Appellant Herring's application for certificate of appealability is granted in part and denied in part. The application is granted as it pertains to the following issues:

(1) Whether the Florida Supreme Court acted contrary to *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990) and violated the Eighth and Fourteenth Amendments in upholding Herring's sentence despite the elimination of the heightened premeditation aggravating circumstance;

(2) Whether Herring was deprived of the effective assistance of counsel at the sentencing phase of his criminal trial; and

(3) Whether, in evaluating Howard Pearl's conflict of interest under the Sixth Amendment, the state courts unreasonably applied *Cuyler v. Sullivan*, 100 S. Ct. 1708 (1980) to the facts of Herring's case.

As to all other claims in his § 2254 petition, Appellant Herring's application is denied.

The parties should file freestanding briefs which do not incorporate by reference any of the arguments or authorities contained in the application for certificate of appealability or response thereto. The principal briefs shall not exceed 50 pages and the reply brief shall not exceed 20 pages. The parties should not expect an enlargement of the length limitations for their briefs, nor should they expect any extension of time for filing those briefs.

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY

CASE NO. 81-1757-C

STATE OF FLORIDA,

Plaintiff,

v.

TED HERRING,

Defendant.

NOTICE OF FILING

Comes now the State of Florida, by and through the undersigned counsel, and hereby gives notice of filing, the attached decision from the United States Court of Appeals for the Eleventh Circuit, dated January 31, 2005.

Respectfully submitted,

CHARLES J. CRIST, JR.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Jon M. Wilson, John R. Hamilton, Foley & Lardner, 111 N. Orange Ave., Suite 1800, Orlando, FL 32802-2193, Jeremy G. Epstein, Alan S. Goudiss, Daniel Schimmel, Adam S. Hakki, Hayden S. Baker, Shearman & Sterling, Citicorp Center, 599 Lexington Ave., New York, New York 10022, Leon H. Handley, Gurney & Handley, P.A., 225 E. Robinson St., Suite 450, Orlando, FL 32801 the attorney(s) for the Petitioner on this 31st day of January, 2005.

/s/ KENNETH S. NUNNELLEY
Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12598

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
January 31, 2005
THOMAS K. KAHN
CLERK

D.C. Docket No. 99-01413 CV-ORL-18KRS

TED HERRING,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(January 31, 2005)
Before BIRCH, DUBINA, and BLACK, *Circuit Judges*.

BLACK, Circuit Judge:

Appellant Ted Herring filed a habeas petition under 28 U.S.C. § 2254 challenging his 1982 state-court convictions for armed robbery and first-degree murder, and his resulting death sentence. The district court denied Herring's petition. We granted a certificate of appealability (COA) on three issues. We now affirm.

I. BACKGROUND

A. *Factual Background*

On May 29, 1981, Herring held up a 7-Eleven convenience store in Daytona Beach. Herring shot and killed the store clerk. A hold-up note was found at the scene. At some point, the police determined that Herring's fingerprint was on the note. The murder weapon was never found.

After the robbery, Herring was arrested on charges relating to a stolen car and was taken to the Daytona Beach Police Station. He waived his *Miranda* rights and made three statements, in two of which he confessed to the robbery and homicide at the 7-Eleven store. Three officers were involved in the interrogations.

In his first statement, which was taped, Herring told the officers he went to the store with the intent to commit a robbery, but before he could commit the crime, a second man robbed the store and killed the clerk. In a second, unrecorded statement made privately to Detective Varner, Herring stated he shot the clerk in the head and then, while the clerk was lying on the ground, shot the clerk a second time to eliminate him as a witness. In a final, taped statement to the officers, Herring claimed he robbed the store and only accidentally shot the clerk when he thought the clerk was coming across the counter. Herring stated he shot the clerk a second time out of fear.

B. *Procedural Background*

In February 1982, Herring was tried in Volusia County for armed robbery and first-degree murder. He was represented by two public defenders: Howard Pearl and Peyton Quarles. Pearl handled the guilt phase of the trial and Quarles handled the penalty phase.

Detective Varner testified at the guilt phase regarding Herring's unrecorded statement. Following Varner's direct testimony, Pearl cross-examined him on the length of interrogation and whether Herring received food or time to rest during the interrogation. Pearl similarly cross-examined the two other officers involved in questioning Herring. Herring testified on his own behalf, relating his initial story—that he planned to commit the robbery, but another person beat him to it and killed the clerk.

The jury found Herring guilty on both counts against him. The penalty phase followed. The only witness testifying in mitigation was Herring's mother, Dorothy Meyers. The jury returned an advisory sentence of death by an eight-to-four vote.

The trial judge sentenced Herring to death. In aggravation, the trial judge found and considered as aggravating circumstances: (1) "[t]he Defendant has been previously convicted of another capital offense or of a felony involving the use o[r] threat of violence to some person;" (2) "[t]he crime for which the Defendant [wa]s to be sentenced was committed while he was engaged in the commission of the crime of robbery;" (3) "[t]he crime for which the Defendant [wa]s to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;" and (4) "[t]he crime for which this Defendant [wa]s to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." In mitigation, the trial judge found and considered as mitigating circumstances: (1) the Defendant was 19 years old at the time of the crime; and (2) "Defendant had a difficult childhood," *i.e.*, "Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble

in school." The Florida Supreme Court affirmed Herring's convictions and death sentence on direct appeal.

In April 1985, Herring filed his first Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief. The state trial court denied the motion and the Florida Supreme Court affirmed. In March 1987, Herring filed a petition in the Florida Supreme Court for a writ of habeas corpus. The Florida Supreme Court denied relief. Herring then filed a petition in federal court under 28 U.S.C. § 2254 for a writ of habeas corpus. The district court dismissed the petition without prejudice due to Herring's failure to exhaust his state court remedies.

In 1989, Herring filed a second Rule 3.850 motion, claiming, *inter alia*, that his death sentence should be vacated under *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), which declared the premeditation aggravator inapplicable to cases like Herring's. The state trial court denied relief under *Rogers*. The court did, however, grant Herring leave to amend his motion to add a claim that Pearl operated under an impermissible conflict of interest in serving both as Herring's trial counsel and as a special deputy sheriff. The trial court denied the amended motion. The Florida Supreme Court held the premeditation aggravating factor should not have been applied, but affirmed without granting a new sentencing hearing. On the conflict-of-interest claim, the court remanded for an evidentiary hearing.

On remand, Herring's conflict-of-interest claim was consolidated for hearing with similar claims raised by other defendants who had been represented by Pearl. The state trial judge denied relief. The Florida Supreme Court remanded for individual hearings on the appealed cases, including Herring's. The state trial court held a second

hearing and again denied Herring's conflict-of-interest claim. The Florida Supreme Court affirmed.

Herring filed a § 2254 petition for a writ of habeas corpus in federal district court. The district court denied relief and denied a COA. This Court granted a COA on three issues:

> (1) Whether the Florida Supreme Court acted contrary to *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990) and violated the Eighth and Fourteenth Amendments in upholding Herring's sentence despite the elimination of the heightened premeditation aggravating circumstance;
>
> (2) Whether Herring was deprived of the effective assistance of counsel at the sentencing phase of his criminal trial; and
>
> (3) Whether, in evaluating Howard Pearl's conflict of interest under the Sixth Amendment, the state courts unreasonably applied *Cuyler v. Sullivan*, 100 S. Ct. 1708 (1980) to the facts of Herring's case.

II. DISCUSSION

A. *Standard of Review Under 28 U.S.C. § 2254*

Our habeas review of a state court's rulings is restricted by § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. (AEDPA). Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523 (2000). A state court's decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1) if its application is objectively unreasonable. *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001). "[A]n *unreasonable* application of federal law is different from an *incorrect* or erroneous application of federal law." *Williams*, 529 U.S. at 412, 120 S. Ct. at 1523.

A federal court's review is further restricted by 28 U.S.C. § 2254(e), which provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. *Claim under* Clemons v. Mississippi

Under the Supreme Court's ruling in *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990), when a state appellate court determines a death sentence is based on an invalid or improperly defined aggravating factor, that court may reweigh the aggravating and mitigating evidence, conclude the error was harmless, or remand for a new sentencing. *Id.* at 741, 754, 110 S. Ct. at 1444, 1451.

Herring contends that when the Florida Supreme Court struck the heightened premeditation aggravating circumstance but nevertheless affirmed his death sentence, it failed to conduct any of the three analyses set out as permissible in *Clemons*. In response, the state argues: (1) Herring's claim is procedurally barred; (2) Herring's claim alleges nothing more than an error of state law and therefore is not cognizable in federal habeas corpus; and (3) Herring received all the process he was due. The district court rejected Herring's claim on two bases, one of which was that the claim was procedurally barred.

Herring did not present any arguments pertaining to procedural bar in his initial brief. In his reply brief, however, Herring argues his *Clemons* claim is not procedurally barred because he did present his *Clemons* argument to the Florida Supreme Court during proceedings on his second 3.850 motion and the Florida Supreme Court reached the merits of his claim.[1] As we repeatedly have admonished, "[a]rguments raised for the first time in a reply brief are not properly before a reviewing court." *United States v.*

[1] We note Herring does not argue in the alternative that there is cause and prejudice excusing his procedural default or that, if raised for the first time in state court now, it would not be barred under state law procedural bar principles.

Coy, 19 F.3d 629, 632 n.7 (11th Cir. 1994) (citation omitted); *see also United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (Court need not address issue raised for first time in reply brief), *cert. denied*, 539 U.S. 951, 123 S. Ct. 2628 (2003); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (issue raised for first time in reply brief waived); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996) (declining to consider arguments raised for the first time in a reply brief). Although Herring's failure to present his procedural bar argument in his initial brief is determinative, we nevertheless briefly discuss procedural bar and the arguments Herring raises in his reply brief.

"A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim[s] in federal court absent a showing of cause for and actual prejudice from the default." *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506-07 (1977)). This procedural default arises in two situations: (1) where the state court itself correctly applies state law procedural bar principles to conclude a federal claim is barred; and (2) where a claim was never raised in state court, and it is clear the unexhausted claim would now be barred under state law procedural bar principles. *Id.* at 1302-03 (citations omitted). The State's argument is that Herring's *Clemons* claim falls within the second category. We agree.

Herring challenged the application of the cold, calculated, and premeditated aggravating factor in his direct appeal.

Herring again challenged the application of the aggravating factor in his initial brief appealing the denial of his

second Rule 3.850 motion, and argued a new sentencing hearing should be conducted. In his reply brief to the Florida Supreme Court, Herring argued the jury's improper consideration of the heightened aggravating factor could not be harmless beyond a reasonable doubt. Herring further stated:

> Indeed, because "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances," *Elledge*, 346 So.2d at 1003, this Court has consistently ordered new sentencing hearings in similar cases. . . . The result here should be no different. *Cf. Clemons v. Mississippi*, 58 U.S.L.W. 4395, 4399-4400 & n.5 (Mar. 28, 1990) (failure to remand to a sentencing jury violates the Constitution "if the decision is made arbitrarily").

The Florida Supreme Court struck the challenged aggravating factor, but affirmed Herring's death sentence stating:

> While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a 'conviction of a prior crime of violence' had been eliminated, that would have changed the facts and circumstances before the jury.

> The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.

Herring v. State, 580 So.2d 135, 138 (Fla. 1991) (citations omitted).

In his motion for a rehearing, Herring made three arguments as to why the Florida Supreme Court's decision was incorrect. Herring first argued the court committed constitutional error in that it failed to apply its "long-standing rule" of remanding for a new sentencing hearing when it strikes one or more aggravating circumstances relied on at sentencing and mitigating circumstances are present. Herring cited *Clemons* in this section of his motion, including again a parenthetical stating that "failure to remand to a sentencing jury violates the Constitution, 'if the decision is made arbitrarily.'" In its response, the State pointed out that in *Clemons*, the Supreme Court "established that state courts may conduct a harmless error analysis if an aggravating circumstance is stricken." Herring acknowledged as much in his second argument—that the Florida Supreme Court's "finding of harmless error [could not] be squared

with the facts of th[e] case."[2] Importantly, although Herring challenged the court's finding of harmless error, he did not assert the court *failed to engage* in harmless error analysis. Indeed, Herring asserted the Florida Supreme Court had engaged in harmless error review, but argued the court erred in its finding of harmlessness. Herring's third argument was that the court's opinion "appears to announce a new rule" that the erroneous application of a statutory aggravator may be deemed harmless where elimination of the circumstance does not alter the facts and circumstances regarding how the defendant committed the murder, and thereby "calls into question the constitutionality, as applied, of Florida's capital sentencing scheme."[3]

After reviewing Herring's state court filings, we conclude that, although Herring made many arguments pertaining to the cold, calculated, and premeditated aggravator, he did not preserve the argument he now makes—that the Florida Supreme Court erred in affirming his sentence after striking the factor without performing the analysis set

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[2] Herring cited *Clemons* in this section of his motion as support for his contention that "[t]he circumstances surrounding both Herring's crime and his sentencing hearing make clear that the erroneous application of the heightened premeditation aggravating circumstance cannot be deemed harmless beyond a reasonable doubt."

[3] With respect to this final point, Herring contended:

> In a case involving substantial mitigation, it is simply impossible to know how the sentencers would have performed the weighty, yet delicate, task of balancing the aggravating and mitigating factors in the absence of one of the aggravating factors. To suggest that the presence or absence of one of the aggravating factors in such a case makes no difference in the weighing process threatens to return the Florida statutory scheme to the "standardless discretion" condemned in *Furman*.

out by the United States Supreme Court in *Clemons*—and the Florida Supreme Court did not consider such a claim.

In summary, we affirm the district court's denial of Herring's claim. The district court found Herring's claim to be procedurally barred. Herring failed to argue the procedural bar issue in his initial brief. Even if the arguments set out in Herring's reply brief had properly been presented in his initial brief, we would have rejected them.[4]

C. *Claim of Ineffective Assistance of Counsel at Penalty Phase*

Herring next claims he received ineffective assistance of counsel at the penalty phase of his trial. Peyton Quarles represented Herring at the penalty phase. Herring makes a number of allegations of ineffectiveness. Neither the state courts nor the district court held an evidentiary hearing on Appellant's claims.

A petitioner is entitled to relief based on ineffective assistance of counsel when he establishes (1) his counsel's performance fell below an objective standard of reasonableness, and (2) "there is a reasonable probability that, but for counsel's errors and omissions, the result of the proceedings would have been different." *Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). Both prongs are mixed questions of law and fact. *Mills v. Singletary*, 161 F.3d 1273, 1285 n.15 (11th Cir. 1998) (citation omitted).

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[4] For the first time, in a supplemental letter brief, Herring asserts additional procedural bar arguments. "[P]arties cannot properly raise new issues at supplemental briefing. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (citation omitted).

1. *Quarles' failure to present mitigating evidence in his possession and failure to conduct a reasonable investigation*

During the penalty phase, Herring's mother, Dorothy Meyers, was the only witness to testify in mitigation. Herring contends Quarles should have done more in mitigation. Specifically, Herring contends: (1) Quarles was ineffective in that he failed to investigate and present other readily available mitigating evidence pertaining to Herring's mental condition, background, and character; and (2) Quarles was ineffective in that he failed to present mitigating evidence in his possession at the time of trial. Underlying Herring's failure-to-investigate claim is the premise that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003) (quoting *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066); *see also Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (citing *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)).

a. *State Court Decisions*

The state trial court held that Herring did not satisfy either prong of the *Strickland* ineffectiveness inquiry. That court concluded:

> 5. The real nub of Defendant's motion is the claim of ineffective trial counsel. Despite the standards set forth in *Knight* and *Strickland* it is very difficult to go back and determine whether

trial counsel's actions or inactions amounted to ineffective assistance of counsel. The Court will attempt to deal with the allegations of ineffectiveness and analyze them in light of *Knight* and *Strickland.*

A. In Paragraph "85" of the 3.850 the Defendant alleges there were reports (see Defendant's exhibits "3" and "4") that the Defendant had serious mental and emotional problems. The Defendant now complains these reports should have been introduced. First it should be noted that at least one of the reports was a result of an interview done when the Defendant was 13 years old. Secondly, the defense did establish learning disabilities and psychological problems through the testimony of the Defendant's mother. Thirdly, one of the reports indicates the mother, who was a defense witness and represented to be a concerned mother, was not keeping the child's appointments with the counselor. Lastly, the reports indicate the Defendant was of dull normal intelligence. Taking this all into consideration this Court does not find the failure to introduce these reports was a professional deficiency.

B. In Paragraph "86" of the 3.850 the defense claims trial counsel failed to adequately present other readily available mitigation evidence. This is perhaps the most difficult assertion to analyze. Here more than any other area there is tendency to second guess. In every case that is lost counsel may go back, with the advantage of hindsight,

and say this or that should or could have been done.

The defense had the Defendant's mother testify during the sentencing phase. She did establish the Defendant's home life was not good; his parents were separated; he was hyperactive with a low IQ and a learning disability; he had psychological problems; that his mother loved Ted. The psychological reports would have been cumulative to the mother's testimony. It also m[u]st be stressed that the trial court did list and consider these matters as mitigating factors.

As to the information set forth in exhibits "7" and "8" the Court questions the importance of the information from the Defendant's former teachers. Obviously much time had passed since they had contact with the Defendant. Their testimony was of doubtful value.

Perhaps the defense should have had the Defendant's other relatives testify on his behalf. While to a large degree it may have been cumulative to that of the mother, perhaps it may in someway [sic] have helped the Defendant. But this Court cannot conclude that trial counsel was deficient in presenting the mother alone. It must be remembered that the area of who trial counsel selects to testify i[s] fr[a]ught with peril. Even the mother, who was an effective defense witness, did admit her son was involved in drug related problems in New York. So trial counsel is caught in a dilemma. He must try to put on mitigating evidence yet not let the State have an opportunity to further damage the Defendant

either by cross or rebuttal. This is especially true where the Defendant was charged with several other armed robberies and apparently was having drug related problems in New York City. All in all the Court finds trial counsel was not deficient in only presenting the mother's testimony. This is a matter of trial strategy and should not be second guessed.

. . . .

6. This Court must view trial counsel's alleged errors and omissions in light of the case as a whole. It was a difficult case from the defense standpoint. The Defendant confessed to the crime. Efforts to suppress the confession failed. The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well. There was little the defense could do to save the Defendant after that.

Additionally, the aggravating factors in this case strongly outweighed the mitigating factors. There were four aggravating[5] and only two mitigating factors. The mitigating factor of age was not strong. The Defendant was at the point where his age was not that much of a consideration.

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5 As explained in Section I.B., one of these aggravating factors was stricken by the Florida Supreme Court subsequent to the state trial court's 3.850 decision.

> Other non-statutory mitigating factors were in fact established by the defense. They were considered by the jury and the court. These mitigating factors were not particularly significant. This Court finds that even if the non-statutory mitigating factors were bolstered by teacher's statements, comments of relatives, and poems of the Defendant, the result would be no different.
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> 7. The Court concludes that the *Knight/Strickland* tests are not met. The trial defense was not deficient, nor did it prejudice the Defendant. The Defendant received a fair trial and a fair sentence hearing.

The Supreme Court of Florida summarily affirmed, stating:

> In his next point, Herring contends that an evidentiary hearing was necessary to decide his ineffective-assistance-of-counsel claims. The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *Knight v. State*, 394 So.2d 997 (Fla. 1981). We agree with the trial judge's findings and commend him for his detailed explanation.

Herring v. State, 501 So. 2d 1279, 1280 (Fla. 1986).

As set out in Section II.A. above, our review of state court decisions is very deferential under § 2254, as amended by AEDPA. "AEDPA modified a federal habeas court's role in reviewing state prisoner applications in

order to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Parker v. Sec'y for the Dep't of Corrs.*, 331 F.3d 764, 768 (11th Cir.) (citation and internal quotation marks omitted), *reh'g and reh'g en banc denied*, 82 Fed. Appx. 224 (11th Cir. 2003), *cert. denied*, 540 U.S. 1222, 124 S. Ct. 1513 (2004). We may grant a § 2254 petition as to a claim adjudicated on the merits in state court only if adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To be entitled to deferential review under 28 U.S.C. § 2254, it is not necessary for the state court to explain its decision. Even a summary, unexplicated rejection of a federal claim qualifies as an adjudication entitled to deference under § 2254(d). *Parker*, 331 F.3d at 775-76; *Wright v. Sec'y for the Dep't of Corrs.*, 278 F.3d 1245, 1253-55 (11th Cir.), *reh'g and reh'g en banc denied*, 34 Fed. Appx. 393 (11th Cir. 2002), *cert. denied*, 538 U.S. 906, 123 S. Ct. 1511 (2003). Moreover, factual findings made by the state courts are presumed to be correct; a petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The state trial court judge who issued a ruling on Herring's ineffective-assistance-of-counsel claim is the same judge who presided at trial. The state trial judge was, therefore, intimately aware of everything that happened at, and was involved in, the trial. In an attempt to obtain similar familiarity, we have reviewed the entire record. It is evident from our review that the state court rulings were

eminently reasonable and were not contrary to clearly established federal law.

We turn first to Herring's contention that Quarles did not perform a meaningful investigation into his mental condition. The state court[6] concluded Herring established neither deficient performance nor prejudice. The record supports the state court conclusions.

Contrary to Herring's contention, it is evident from the record that Quarles did investigate Herring's mental condition. Prior to trial, the defense had Herring evaluated by Dr. William Friedenberg, a clinical psychologist. The State subsequently took Dr. Friedenberg's deposition. In that deposition, Dr. Friedenberg said he had been appointed to evaluate Herring and had considered Herring's "ability to testify about the kind of charges against him and the events as they were reported by others." Dr. Friedenberg testified that, to aid in his evaluation of Herring, he had a 1974 St. Luke's Hospital evaluation of Herring; a report evaluating Herring's oral reading and written language; a copy of the autopsy request form from this case; and a supplemental report by the Daytona Beach Police Department. Dr. Friedenberg also had a closed 1980-81 HRC (Human Resources Center) file, which included a psychological evaluation dated October 30, 1980, reports from psychiatrists, a report on an EEG, and some notes.

In conducting his evaluation, Dr. Friedenberg saw Herring for about three hours. He stated Herring was anxious, but not abnormally so considering the circumstances. Also, Herring became increasingly animated in saying he was

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[6] The Florida Supreme Court expressly stated it agreed with the trial judge's findings. We use the term "state court" in this discussion to refer to the state trial court and the Florida Supreme Court.

innocent and had been set up. Herring denied being at the murder scene.

Dr. Friedenberg administered some tests, but he did not perform an IQ test on Herring; rather, he relied on a 1974 test showing an IQ of 81 and a 1980 test showing an IQ of 82. Dr. Friedenberg said the consistency of the two results led him to believe it was not necessary to readminister an IQ test.

Dr. Friedenberg stated Herring was of dull normal intelligence, but that "would be significantly above what would be considered borderline, retarded or retarded range and includes approximately fifteen percent of the population." He further stated: "One has to understand that Mr. Herring has a rather limited formal education and there are many studies to show that that can affect I.Q. tests such as this by lowering the actual score below what the potential would be." Dr. Friedenberg opined that Herring's IQ should not affect his ability to be a law abiding citizen and would only minimally interfere with Herring's ability to deal with the legal process.

Dr. Friedenberg's mental health conclusions from his evaluation of Herring were as follows:

> [H]e appeared to be most likely a person who would be described as an antisocial personality type who may have some additional problems but in the whole seems to be responding with some anxiety to the situation of having been caught and charged with a crime which holds a rather strong penalty. I did not find him unable to stand trial nor did I have any evidence to show that he was legally not sane at the time of the commission of the alleged crime.

Regarding the diagnosis of Herring as having an antisocial personality, Dr. Friedenberg stated antisocial personality is a recognized form of mental illness that, at the time of the deposition, was not very amenable to treatment. Dr. Friedenberg described the antisocial personality as guiltless, highly aggressive, impulsive, highly sensitive to social criticism, untruthful when it serves the individual's purposes, unable to profit from experience, and having its own sense of morality (coinciding very little with society's sense of morality). Dr. Friedenberg further stated Herring did "not suffer from psychosis or anything that could be considered a gross disturbance of emotional functioning." As for Herring's remorse, Dr. Friedenberg stated: "I think his remorse as far as the one crime that he did admit to was primarily based on the fact that he was caught."

The defense decided not to use Dr. Friedenberg at trial. The State, however, understandably tried to present testimony from Dr. Friedenberg. The State's proffer was that Dr. Friedenberg had made the following determination: "[T]hat the Defendant's personality and character is antisocial. And that he has sufficient and normal intelligence to understand and appreciate his criminal conduct and so forth, in this particular case." The defense objected to the admission of testimony from Dr. Friedenberg, contending, *inter alia*, that the State's use of his testimony was barred under the rule pursuant to which Dr. Friedenberg's evaluation had been obtained by the defense. The trial judge concluded Dr. Friedenberg could not be used as a prosecution witness.

The fact and nature of Dr. Friedenberg's evaluation support the following conclusions. First, Herring's allegation that counsel did not perform an investigation is unsupported. In his brief, Herring contends:

> Quarles did not follow up on [the St. Luke's] reports [in his possession] to understand what they meant and did not obtain the testimony of a mental health expert, who could have competently explained the meaning of an I.Q. test to the jury and could have testified about Herring's mental retardation and brain damage.

This contention simply is not supported by the record. Quarles did consult an expert. Second, the record supports an inference that the case Quarles put on was the product of a tactical decision made after investigation. Quarles knew the substance of Dr. Friedenberg's conclusions and decided to keep the evaluation and Dr. Friedenberg's opinions out of evidence—in fact, he fought to keep Dr. Friedenberg from testifying before the jury. Finally, there was no prejudice to Herring due to Quarles' conduct.

We consider next Herring's claim that his counsel should have investigated his background and presented additional character witnesses. In rejecting this claim, the state trial court stated much of the testimony proffered by Herring was dated and of doubtful value. The state trial court concluded that, given Herring's history of drug involvement and other robberies, as well as counsel's dilemma of putting on mitigating evidence without giving the State an opportunity to further damage the defendant, Quarles' performance was not deficient in presenting the testimony of Herring's mother only. The state trial court further concluded Herring failed to establish prejudice. The state court conclusions have abundant support in the record.

The information as to which at least two of the proffered character witnesses could have testified would have been somewhat dated. Moreover, although one conviction for

robbery was admitted into evidence, there were a number of convenience store robberies as to which evidence was not admitted. The other convenience store robberies were discussed by Herring during his taped statements to police. The trial record reflects, however, that other crimes evidence was redacted from the taped statements played for the jury during the guilt phase. In fact, the state trial court judge excluded evidence of other robberies (aside from the one conviction used as a statutory aggravating factor) from the penalty phase due to defense counsel's agreement not to present mitigating testimony as to Herring's lack of a significant history of prior criminal activity.

As for Herring's drug involvement, the record shows Herring himself made statements to a correctional officer regarding his drug activities in New York. Herring admitted to the correctional officer he had been selling drugs and had been cutting the drugs to make more money.[7]

We turn next to Herring's claim that Quarles was ineffective in failing to introduce reports, including reports from St. Luke's Hospital, regarding Herring's mental condition that were in his possession at the time of trial. The state trial court concluded the reports were not uniformly favorable to Herring, the defense did establish Herring's learning and psychological problems through his mother, and Quarles' failure to introduce the reports into evidence was not a professional deficiency. The state trial court further held Herring failed to establish prejudice. The state court rulings are supported by the record. The reports were dated and were not uniformly favorable to Herring's case.

---

[7] The correctional officer was proffered by the State as a witness to impeach Meyers, but the State withdrew him when it concluded his testimony would not "impeach[ ] or comment[ ] on the credibility of a prior witness."

The state court resolution of Herring's claim is further supported by the fact and nature of Dr. Friedenberg's evaluation of Herring.

Upon review of the record before the state courts, the state court resolution of Herring's claims was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and did not result in a decision that was based on an unreasonable determination of the facts.

b. *District Court Decision*

The district court denied Herring's ineffective-assistance-of-counsel claim, concluding the state court did not reach a decision that was "contrary to, or [that] involved an unreasonable application of, clearly established Federal law. . . [and was not] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The district court further stated:

> Petitioner argues that counsel failed to present any evidence in mitigation and that he should have obtained documentary evidence regarding Petitioner's mental disability and serious emotional problems. Petitioner identifies a report detailing Petitioner's psychological and emotional problems while at the Wiltwyck School and character witnesses who would have testified on his behalf.
>
> As to issue one, the trial court denied it based on the following: 1) at least one of the reports resulted from an interview done when Petitioner was 13 years old; 2) Petitioner's counsel was able to establish learning disabilities and psycho-

logical problems through the testimony of Petitioner's mother; 3) one of the reports established that Petitioner's mother did not keep Petitioner's appointments with the counselor; and 4) the reports reflect that Petitioner was of dull normal intelligence.

The record supports the trial court's findings, and the Court agrees that Petitioner has not shown that his counsel's performance was deficient or that he sustained prejudice. The Court notes that one of the reports resulted from an evaluation performed when Petitioner was 12 years old and that another report described Petitioner as having "intellectual functioning in the dull normal range." The latter report was based on an evaluation done on January 21, 1974, and found Petitioner to have full scale IQ of 81. Moreover, Petitioner's mother testified at sentencing that Petitioner was a "hyperactive child diagnosed by the doctor, with very low IQ of 80, learning disability." She also testified that Petitioner was treated for psychological problems as a child.

. . . .

Petitioner argues that counsel failed to introduce two psychological reports that diagnosed him as suffering from retardation and other organic neurological disorders. Petitioner identifies two reports from St. Luke's Hospital in New York City, which concern evaluations performed on Petitioner when he was 12 and 13 years old.

> The trial court addressed this issue and found it to be without merit. The trial court noted that counsel did present testimony from Petitioner's mother, which revealed that his home-life was poor; that his parents divorced when he was four years old; that he had psychological problems; that he was hyperactive with a low IQ and a learning disability; and that she loved him. The trial court found that the reports would have been cumulative to the mother's testimony.
>
> The record supports the trial court's findings, and the Court agrees that Petitioner has not shown that his counsel's performance was deficient or that he sustained prejudice. The Court notes that Petitioner's mother specifically testified at the penalty phase hearing as to Petitioner's low IQ and learning disabilities and as to Petitioner's poor home-life. The report would have been cumulative to her testimony. The Court also notes that one of the reports actually suggests that Petitioner had normal intellectual abilities: "There is also a discrepancy between Ted's intellectual abilities, *albeit at a Dull-Normal range*, and his actual achievement."

(citations omitted).

Although the district court did not hold a hearing on Herring's ineffective-assistance-of-counsel claim, such treatment of a claim is appropriate where, as here, "a hearing would not assist in the resolution of [petitioner's] claim[s]." *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir.) (citation omitted), *reh'g and reh'g en banc denied*, 48 Fed. Appx. 329 (11th Cir. 2002), *cert. denied*, 537 U.S.

1204, 123 S. Ct. 1278, *reh'g denied*, 538 U.S. 995, 123 S. Ct. 1825 (2203).

Applying the deferential § 2254 standard of review, the district court correctly affirmed the state court decisions. As set out in Part II.C.1.a. above, the state court decisions were supported by the record before those courts. We further note the district court had before it not only the record that was before the state courts in resolving these issues, but also the record of additional post-conviction proceedings in this case. Nothing in the record of these additional post-conviction proceedings undermines the state court decisions.

Most notably, the post-conviction record includes a December 1991 deposition of Quarles that was taken by Herring's current counsel during proceedings on Herring's claim that Pearl had acted at trial under an impermissible conflict of interest. In his deposition, Quarles stated his theory originally was to get Herring to plead guilty. He said the trial judge had indicated that if Herring pled guilty, he would receive a life sentence. (In his own December 1992 deposition, Pearl testified that he had a similar recollection.) When Herring refused to plead guilty, Quarles' tactic was to try to convince the jury that Herring was young and ignorant.

In terms of investigation, Quarles stated that he talked to Herring about "possible witnesses, events in his life, relatives." Quarles also testified that he had Herring examined and "a report was produced." He testified that he did not know how to get the childhood reports regarding Herring's mental condition admitted: "I made some attempt to talk to a doctor or two that had examined him and either I couldn't locate them or they had other information or they had other testimony that was detrimental to call as a witness."

When questioned specifically about a report from St. Luke's Hospital, Quarles further stated:

> I can't specifically say what I did or if I was able to locate the doctor. I do know that I attempted to locate some doctors, could not—was unsuccessful as to one or two or one. It seems to me there was some doctor somewhere, maybe here, that was definitely going to throw in Mr. Herring despite this and this and this, Mr. Herring [k]new exactly what he was doing and Mr. Herring intended to kill Mr. Heolzelg [sic].

With respect to investigating and presenting character witnesses, Quarles stated that, through his discussions with Herring and Meyers, he concluded there was no one who could attend the trial who might be a good character witness on Herring's behalf.

Again, the state court rulings were sustainable on the record that was before the state courts in ruling on Herring's claims. Moreover, the additional post-conviction record before the district court does nothing to undermine those rulings. We affirm the district court's denial of Herring's claims.

2. *Quarles' failure to contest the heightened premeditation aggravating circumstance*

Herring next contends Quarles' performance was deficient in that he did not object to the applicability of the heightened premeditation aggravating circumstance. Counsel's performance cannot be deemed to have been deficient because, at the time of Appellant's sentencing, the aggravator was interpreted to cover Appellant's case. In fact, the Florida Supreme Court initially affirmed the

application of the aggravator to Appellant's case. Moreover, as to the prejudice prong, the Florida Supreme Court subsequently eliminated the aggravator from Herring's case, but nevertheless affirmed the death sentence.

3. *Quarles' failure to object to the avoidance of arrest jury instruction*

Herring contends Quarles was ineffective in that he did not object to the avoidance of arrest instruction. Herring asserts the trial court's instruction was erroneous in two respects: (1) the instruction did not advise the jury that it could find the aggravator only if it concluded beyond a reasonable doubt that eliminating a witness was the dominant or sole motive of the killing; and (2) the instruction did not advise the jury that, under Florida law, the uncorroborated testimony of a single witness may be insufficient to support a finding of an aggravator.

The State contends, as the district court concluded, that Herring's claim is procedurally barred because he never raised it in state court. Herring did not address the district court's finding of procedural bar in his initial brief. In his reply brief, Herring contends he raised the claim in his first 3.850 Motion at ¶94. Again, "[a]rguments raised for the first time in a reply brief are not properly before a reviewing court." *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994) (citation omitted); *see also United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002), *cert. denied*, 539 U.S. 951, 123 S. Ct. 2628 (2003); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996). Although Herring's failure to present argument in his initial brief is determinative, we nevertheless briefly

discuss the procedural bar argument Herring raises in his reply brief.

In ¶ 94 of his first 3.850 motion, Herring stated:

> As discussed *supra* at paragraphs 23 through 48, the cases construing the heightened premeditation and avoidance of arrest aggravating circumstances demonstrate quite clearly that neither of these aggravating circumstances was applicable to this case. Despite the substantial body of case law favorable to petitioner's position, his counsel never contested the applicability of the heightened premeditation aggravating circumstance and made at most a feeble attempt to rebut the applicability of the avoidance of arrest aggravating circumstance. Counsel's failure seriously prejudiced petitioner's sentencing hearing, thereby undermining the fairness of the proceeding.

This statement does not amount to an argument that Quarles was ineffective for not objecting to the avoidance of arrest instruction.

In summary, we reject Herring's claim. The district court found Herring's claim to be procedurally barred. Herring did not address procedural bar in his initial brief. Even if he had properly presented his procedural bar argument, we would have rejected it.

4. *Quarles' failure to object to the cross-examination of Meyers*

Herring next argues that, through its cross-examination of his mother, Dorothy Meyers, the State improperly introduced evidence of a non-statutory aggravating circumstance. He states: "Although it is state law that precludes

the admission of a non-statutory aggravating circumstance . . . trial counsel's failure to prevent the admission of this evidence constitutes ineffective assistance of counsel, which is a constitutional issue."

During the penalty phase of Herring's trial, Quarles presented testimony from Meyers that Herring at some point had moved to Florida:

> Q. When did Ted leave your home?
> A. Do you mean for Florida or coming down here or. . .
> Q. For Florida?
> A. Or for the different schools I put him in?
> Q. Florida.
> A. About a year and a half or almost close to two years.

On cross-examination, the State conducted the following questioning of Meyers:

> Q. Mrs. Myers, have you ever had an occasion to talk with a Mr. James B. Brock?
> A. I might have. I don't recall the name.
> Q. He's a Correctional Probation officer in the State of Florida. Does that help?
> A. I believe so.
> Q. Did you tell Mr. Brock that the reason you sent your son to Florida, was because your son had become involved in some drug dealings in New York City, and it was necessary for him to get away from New York City quickly, that the word was out that people involved, who were supplying your son with drugs, were out to get him?

A. I didn't say [Pause] of those words, no. I said that he went to the police and testified about some drugs. I don't know what he might have put down there.
Q. You never told anybody the reason he left New York was because he was involved—
A. Well, his life was in danger because, if he would testify against the drug dealers, his life was in danger.
Q. Did he ever testify?
A. No. Because I sent him here.
Q. But, it is your testimony that you indicated to the correctional officer that this involved testimony?
A. Well, let's put it this way. I didn't know if— It never got to trial. He went to the police and informed the police about it.
Q. Did you tell that to the correctional officer?
A. I might have.
Q. Is it possible that you didn't?
A. I really don't remember.
Q. Do you recall telling the correctional officer, Mr. Brock, that your son got involved over his head with drug suppliers and they were blaming him for the missing drugs?
A. I don't remember.

Herring contends this cross-examination was improper and Quarles was ineffective in that he failed to object to it.

In rejecting Herring's claim, the state court concluded:

Yet the door was opened to this cross because on direct the mother testified she sent him to Flori-

> da about two years ago. The State had the right and duty to ask why he was sent to Florida. A defense objection to this line of questioning would have been overruled.

The Florida Supreme Court agreed with the trial court's findings and affirmed its decision. The district court agreed, holding Quarles' representation was not deficient and Herring had not shown prejudice.

The Florida Supreme Court already has told us how the issues would have been resolved under Florida state law had Quarles done what Herring argues he should have done—objected to the State's cross-examination of Meyers. It is a "fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters." *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997) (citations omitted). Accordingly, with regard to this claim, we hold Herring cannot establish either deficient performance by Quarles or prejudice.[8] We therefore reject Herring's argument that Quarles was ineffective in failing to object to the State's cross-examination of Meyers.

D. *Conflict of Interest*

The final issue before the Court is Herring's contention that, at the time of trial, Howard Pearl had an impermissible conflict of interest due to the fact that he held the sta-

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[8] Although we will grant relief if application of a state law violates a specific federal constitutional right or if a state trial judge's erroneous admission of evidence makes petitioner's trial "so fundamentally unfair that the conviction was obtained in violation of the due process clause of the fourteenth amendment," *Thigpen v. Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991) (citations omitted), neither circumstance is present in this case.

tus of special deputy sheriff so he could carry a firearm. In his brief, Herring contends Pearl's "need to carry a concealed weapon, dependent as it was upon maintaining the favor of law enforcement in general and the Marion County Sheriff in particular, who could revoke that privilege at will, is precisely the type of personal interest that may create a conflict as contemplated by the Sixth Amendment." Herring argues that, as a result of this conflict, Pearl failed to contest the credibility of the law enforcement officers, in fact bolstered their credibility during closing argument, and chose an unreasonable trial strategy that did not require him to challenge the officers. The state court held hearings on this issue and denied Herring's claim on the merits.

After conducting an evidentiary hearing, the state trial judge made the following findings:

> Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family." The sheriff of Marion County in 1970, Doug Willis, apparently granted Mr. Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm.... Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.
>
> Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriff's Self-Insurance Fund, he had no criminal law

enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff. . . .

Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and never [was] given the authority to make any arrests, stops or any other duties as a deputy sheriff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified

that Mr. Pearl's status was "honorary" in nature and was solely for the purposes of Mr. Pearl being able to carry a concealed firearm.

In addition, James P. Gibson, the Public Defender for the Seventh Judicial Circuit at present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as a special deputy sheriff and that status was honorary and only for the purpose of carrying a concealed firearm. . . . Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff' for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status. . . .

Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the

> adverse effect of his conflict of interest. However, defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.

Herring v. State, 730 So. 2d 1264, 1267-68 (Fla. 1998) (alteration in original) (quoting trial court's decision). The Florida Supreme Court affirmed, concluding Herring failed to establish that Pearl labored under an actual conflict of interest, and further stating: "The record reveals no evidence suggesting that Herring's interests were impaired or compromised as a result of Pearl's special deputy status." *Id.* at 1268. Applying the § 2254 standard of review, the district court denied relief.

In *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980), the Supreme Court considered a claim of ineffective assistance of counsel in a case where defense counsel represented three codefendants without objection. *Id.* at 337-38, 100 S. Ct. at 1712. The Court held: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 100 S. Ct. at 1718. Subsequently, in *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237 (2002), the Supreme Court rephrased the analysis somewhat and stated an "actual conflict" is what a defendant must establish under *Cuyler* to prove a Sixth Amendment violation. *Id.* at 171, 172 n.5, 122 S. Ct. at 1243, 1244 n.5. The Court

defined an actual conflict as (1) a conflict of interest that (2) adversely affected his lawyer's performance. *Id.*

Herring does not take issue with the individual state court findings so much as he contends the state courts unreasonably applied Cuyler by "exclusively relying on Pearl's status as a law enforcement officer, and refusing to consider evidence of Pearl's [deficient] performance at trial." Herring argues that under *Cuyler* the issue of whether there was a conflict cannot be divorced from the issue of counsel's performance. The case on which Herring primarily relies is *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998*), abrogation on other grounds recognized by Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001). The petitioner in *Neelley* alleged her attorney suffered from an impermissible conflict of interest where the attorney signed a book deal with petitioner three months after trial and the filing of a motion for a new trial. We concluded that where counsel had competently represented petitioner's interests and no others at trial, it was "not unreasonable for the Alabama Court of Criminal Appeals to find only the existence of a potential conflict of interest, rather than an actual conflict." *Id.* at 926. Contrary to Herring's apparent suggestion, we do not read *Neelley* as eliminating the need for there to be a conflict of interest in the first place. If we were to focus only on the quality of Pearl's trial performance, our analysis would be bound by *Strickland*, not *Cuyler*.

In *Quince v. Crosby*, 360 F.3d 1259 (11th Cir.), *reh'g and reh'g en banc denied*, 104 Fed. Appx. 154 (11th Cir.), *cert. denied*, ___ U.S. ___, 125 S. Ct. 436 (2004), we considered a conflict-of-interest claim by another defendant who had been represented by Pearl. In that case, the state trial court and the district court made findings very similar

to those made in the case before us. For example, the state trial court made the following findings:

> Mr. Pearl never was and never has been a law enforcement officer with the Marion County Sheriff's Department. Mr. Pearl was in essence granted a concealed weapons permit from the Marion County's Sheriff's Department as many other individuals were at that time. Counter to the defense counsel's assertions, the Court determines from the facts presented that Mr. Pearl had no manifest or actual authority to act as a fully constituted Deputy [S]heriff for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

Id. at 1264 (quoting state trial court findings). Moreover, the district court in *Quince* found:

> [T]he uncontroverted testimony was that Mr. Pearl obtained and maintained his special deputy status solely in order to be able to carry a firearm while traveling throughout the state. He had no law enforcement duties, no arrest powers, and no uniform; he received no law enforcement training, no compensation, and no internal memoranda from the Sheriff's Office. The title was merely honorary. Once state law changed to permit Mr. Pearl to obtain a state license to carry a concealed firearm, he resigned his special deputy position.

Id. (quoting district court findings). We concluded in *Quince* there was no conflict. *Id.* at 1264. We reach the same conclusion here.

Given the presumption of correctness attached to the state court factual findings, 28 U.S.C. § 2254(e), and our recent decision in *Quince* considering the very same alleged conflict of interest raised in this case, we cannot say the Florida Supreme Court unreasonably applied *Cuyler v. Sullivan*. On these bases, we affirm the district court's denial of the petition on this ground.

III. CONCLUSION

We hold Herring's claim under *Clemons v. Mississippi* is without merit. We further hold Herring's claim that he received ineffective assistance of counsel at sentencing to be without merit. Finally, we hold the state court did not unreasonably apply *Cuyler v. Sullivan* to Herring's claim that Pearl suffered from an impermissible conflict of interest due to his status as a special deputy sheriff.

AFFIRMED.

[LETTERHEAD]
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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March 29, 2005

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 03-12598-P
Case Style: Ted Herring v. Secretary, Department of Correction
District Court Number: 99-01413 CV-ORL-18KRS

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Joyce Pope (404) 335-6200

Encl.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12598-P

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 29 2005

THOMAS K. KAHN
CLERK

TED HERRING,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion January 31, 2005, 11th Cir., 2005, ___ F.3d___)

Before: BIRCH, DUBINA, and BLACK, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ SUSAN H. BLACK
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

MOTION FILED

AUG 1 - 2005

(4)

No. 05-16

In the Supreme Court of the United States

TED HERRING,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF FORMER FEDERAL PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), Elkan Abramowitz, Zachary W. Carter, Jo Ann Harris, Loretta E. Lynch and Thomas P. Sullivan respectfully move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner Ted Herring. Consent to the filing of this *amicus* brief was granted by counsel for petitioner but was denied by counsel for respondent.

Amici are five prominent former federal prosecutors. Elkan Abramowitz served as Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York from 1976 until 1978. Zachary W. Carter served as the U.S. Attorney for the Eastern District of New York from 1993 to 1999. Jo Ann Harris was Assistant Attorney General in charge of the Justice Department's Criminal Division from 1993 to 1995. Loretta E. Lynch served as the U.S. Attorney for the Eastern District of New York from 1999 to 2001. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981.

As former prosecutors, *amici* are an unlikely group to come together in support of a capital defendant. Yet we share a common conviction that to affirm Ted Herring's death sentence despite the flaws that have pervaded his case would undermine the integrity of our criminal justice system. *Amici* have a strong interest in preserving public confidence that the death penalty is not imposed arbitrarily or capriciously. Because an affirmance of Ted Herring's death sentence would most certainly weaken that confidence, we submit this brief in support of certiorari. *Amici* believe that their participation will assist the Court in resolving the issues presented in this case.

For the reasons stated above, Elkan Abramowitz, Zachary W. Carter, Loretta Lynch and Thomas P. Sullivan respectfully request that the Court grant their motion for leave to file this brief.

Respectfully submitted.

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BRIEF OF FORMER FEDERAL PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[1]

Not even the staunchest advocate of the death penalty would aver that the capital punishment systems in the United States are administered totally free of factual, legal or moral error. Although capital punishment is ostensibly reserved for criminals who are convicted of only the most heinous crimes, it is undeniable that the subjectivity inherent in judge/jury sentencing discretion will on occasion result in death sentences for some defendants who are less morally culpable than other defendants who are sentenced to life in prison.

Amici do not all share one opinion on the morality of the death penalty. Yet, as a group we share the belief that in cases where the irrevocable penalty of death may be imposed a meticulous post-verdict review is indispensable to public confidence that an avoidable injustice has not occurred.[2] "Society's responsibility for government inflicted death does

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission.

[2] Elkan Abramowitz served as Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York from 1976 until 1978. Zachary W. Carter served as the U.S. Attorney for the Eastern District of New York from 1993 to 1999. Jo Ann Harris was Assistant Attorney General in charge of the Justice Department's Criminal Division from 1993 to 1995. Loretta E. Lynch served as the U.S. Attorney for the Eastern District of New York from 1999 to 2001. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981.

not end with the verdict."[3] It is inevitable that errors will sometimes occur in capital proceedings; that is all the more reason for judges, prosecutors and defense lawyers to be meticulous in their efforts to minimize the occurrence of such errors to the greatest extent possible. It is our common conviction that in a capital trial judges, prosecutors and defense lawyers have an obligation to respect and uphold every right of the defendant and to ensure that all constitutionally required procedural safeguards are scrupulously adhered to. On appeal, it is crucial that appellate judges engage in a painstaking review of every death sentence.

As former prosecutors, we are an unlikely group to join together and advocate on behalf of a criminal defendant. We join this brief, however, united in our belief that to affirm Ted Herring's death sentence despite the flaws that have pervaded his case would undermine the integrity of our criminal justice system.

Herring was denied federal habeas review of a patently meritorious claim under *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), based on erroneous interpretations of procedural default rules. It is imperative that judges be exacting when analyzing procedural rules in capital proceedings to ensure that federal claims are not wrongly denied. When the consequence of misapplied procedure is to affirm a capital sentence before valid federal claims are reviewed, that imperative is all the greater.

Herring was also deprived of the effective assistance of counsel during the sentencing phase of his trial. Peyton Quarles' representation of Herring during sentencing failed to satisfy the standard for effective counsel imposed by this

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[3] Marla L. Mitchell, *The Wizardry of Harmless Error: Brain, Heart, Courage Required When Reviewing Capital Sentences*, 4 KAN. J. L. & PUB. POL'Y 51 (1994).

Court in *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000), *Wiggins* v. *Smith*, 539 U.S. 510, 533-34 (2003) and recently reaffirmed in *Rompilla* v. *Beard*, 125 S.Ct. 2456, 2466 (2005). The *amici* have a strong interest in competence of defense counsel during the sentencing phase of a capital trial. Not only is it required by the Sixth, Eighth and Fourteenth Amendments of the Constitution but, moreover, we can be assured of the fairness and justness of the capital systems in which we participate only if we are confident that defense counsel will provide the sentencer with every available reason for not imposing the death penalty.

ARGUMENT

I. THE ELEVENTH CIRCUIT IMPROPERLY DENIED FEDERAL HABEAS REVIEW OF HERRING'S MERITORIOUS *CLEMONS* CLAIM BASED ON A FLAWED APPLICATION OF PROCEDURAL DEFAULT RULES

A person who faces execution deserves a legitimate opportunity to have a federal habeas court review the merits of all his federal claims. Federal habeas review should serve as an additional assurance against error in state capital proceedings. The Eleventh Circuit denied Herring the opportunity for habeas review of his claim under *Clemons* v. *Mississippi* on two separate grounds, both of which involved a misapplication of procedural default rules. The gravity of the injustice of denying habeas review of Herring's *Clemons* claim based on a specious interpretation of procedural rules is magnified by the extent to which the facts and law support the validity of Herring's claim. This injustice is further magnified by the fact that Herring's is a capital case.

A. Herring's *Clemons* Claim Is Meritorious

In *Clemons* this Court held that the Eighth and Fourteenth Amendments preclude a state from upholding a death sen-

tence affected by an invalid aggravating circumstance without reweighing the evidence or conducting an appropriate harmless error analysis. 494 U.S. at 750-54. Where a state supreme court reviews a death sentence tainted by an invalid aggravating circumstance, the court must remand for a new sentencing hearing, independently reweigh the aggravating and mitigating circumstances, or make an individualized determination, based on the particular facts of the case, that the error was harmless. *Hopkins* v. *Reeves*, 524 U.S. 88, 92-93 (1998); *Sochor* v. *Florida*, 504 U.S. 527, 532 (1992); *Clemons*, 494 U.S. at 754. Moreover, this Court emphasized in *Clemons* the importance of a sentencer's consideration of a defendant's mitigating evidence and held that a conclusory statement to the effect that the state court has conducted the mandatory analysis will not suffice. *Id.* at 752.

If the state court decides to engage in harmless error analysis, this Court has required the state court to provide both a clear statement that it is conducting such analysis *and* an individualized description of why the error is harmless if it so concludes. *Id.* at 752-53. The Florida Supreme Court in *Herring* failed to satisfy this standard where, after striking the heightened premeditation aggravating factor, the court stated merely,

> Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.

Herring v. *State*, 580 So. 2d 595, 604 (Fla. 1991).

This Court recognized the invalidity of such a perfunctory analysis in another case that is strikingly similar to Her-

ring's. See *Sochor*, 504 U.S. at 539-40. In *Sochor*, the Florida Supreme Court struck the same heightened premeditation factor as in Herring's case but nevertheless upheld the death penalty, stating,

> Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.... Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

Sochor v. *Florida*, 580 So. 2d 595, 604 (Fla. 1991) (internal citations omitted).

This Court held that to permit the Florida Supreme Court to affirm the defendant's death sentence based on such a cursory reweighing would deprive the defendant of "the individualized treatment that would result from an *actual* reweighing of the mix of mitigating factors and aggravating circumstances," in violation of his rights under the Eighth Amendment. *Sochor*, 504 U.S. at 532 (quoting *Clemons*, 494 U.S. at 752). This Court thus vacated Sochor's death sentence, holding that the Florida Supreme Court's reasoning was inadequate to demonstrate that it had sufficiently engaged in harmless error analysis to meet the standard imposed by *Clemons*. Id at 539-40

No substantive difference exists between the Florida Supreme Court's opinions in *Sochor* and *Herring*. The similarity of the two opinions is not surprising given that both decisions were rendered on the same day, both vacated the same aggravating circumstance, and both ultimately affirmed the death penalty. There are, however, important differences between the facts of the two cases. In *Sochor*, after the Florida Supreme Court struck the premeditation factor there were

no mitigating circumstances to weigh against the remaining three aggravating factors. See *Sochor*, 504 U.S. at 530. In Herring's case, two mitigating circumstances weighed against three remaining aggravators, thus making the case for vacating the sentence even stronger in *Herring* than in *Sochor*.

Given that the opinions of the Florida Supreme Court in *Sochor* and *Herring* are substantively identical, it is clear that by this Court's standard the Florida Supreme Court violated Ted Herring's rights under the Eighth and Fourteenth Amendments when it affirmed his death sentence with only a perfunctory harmless error analysis.

B. The Eleventh Circuit Improperly Denied Herring's *Clemons* Claim Based On Erroneous Applications Of Two Procedural Rules

The Eleventh Circuit refused to conduct federal habeas review of Herring's meritorious *Clemons* claim on two alternative grounds. First, the Eleventh Circuit held that because Herring did not address the district court's determination that his *Clemons* claim was procedurally barred in his initial brief, the issue was not properly before the court. *Herring* v. *Florida*, 397 F.3d 1338, 1342 (11th Cir. 2005). Second, the Eleventh Circuit upheld the district court's determination that habeas review of Herring's *Clemons* claim was procedurally barred because Herring did not properly raise the claim in state court. *Id.* at 1344. Both of these holdings rest on erroneous and hyper-technical interpretation of the respective procedural rules.

1. The Eleventh Circuit Erred in Denying Herring's Clemons *Claim On the Ground That He Did Not Address The Procedural Bar Issue In His Initial Appellate Brief.*

The Eleventh Circuit's primary ground for denying Herring's *Clemons* claim was that "arguments raised for the first

time in a reply brief are not properly before a reviewing court." *Id.* at 1353 (quoting *U.S.* v. *Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994)).

The Eleventh Circuit misinterpreted the precedent it cited for this proposition. In *Coy*, the Eleventh Circuit denied an appellant's argument when it was raised for the first time in his reply brief. 19 F.3d at 632 n.7. The distinction between *Coy* and *Herring*, however, is that in *Coy* the argument had in fact only been made for the first time in the appellant's reply brief. The Appellant had not asserted the argument in proceedings below, as was the case here. Here the issue of procedural bar was fully presented to and considered by the district court. The State raised the procedural bar issue in its appellate brief, Herring responded in the reply brief, and the Eleventh Circuit accepted a further letter-brief from the State following the oral argument and invited Herring to submit a letter-brief.[4]

This Court has held that a reviewing court "may consider any issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties failed to identify and brief." *U.S. Nat'l Bank* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990)). Herring's initial brief was

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[4] The Eleventh Circuit invited Herring to submit a letter brief on the procedural bar issue by order entered March 12, 2004. In its opinion, the Eleventh Circuit dismissed the arguments raised in the letter brief with the following footnote: "For the first time, in a supplemental letter brief, Herring asserts additional procedural bar arguments. 'Parties cannot properly raise new issues at supplemental briefing.'" *Herring*, 397 F.3d at 1344 n. 4 (citation omitted). That the Eleventh Circuit could purport to disregard arguments presented in Herring's letter brief, when it invited the filing of such brief by its own order, is incomprehensible.

predicated on the threshold issue that his *Clemons* claim was not defaulted.

Herring's argument that the district court erred in ruling that his *Clemons* claim was procedurally barred was not "made for the first time in [his] reply brief"; rather, it was made for the first time before the district court when the district court so ruled. *Coy* does not address such circumstances, and the Eleventh Circuit cited no authority overruling this Court's holding in *U.S. Nat'l Bank*.

Thus, the Eleventh Circuit erred in denying Herring habeas review of his *Clemons* claim on the ground that Herring did not address in his initial brief the district court's ruling that his *Clemons* claim was procedurally barred.

2. *The Eleventh Circuit's Holding that Herring's* Clemons *Claim is Procedurally Barred is Without Merit.*

As an alternative ground for denying Herring's *Clemons* claim, the Eleventh Circuit affirmed the district court's ruling that Herring did not preserve the claim he made on habeas review by first asserting that claim before the state courts. *Herring*, 397 F.3d at 1344.

Herring asserted his *Clemons* claim at the earliest possible time: when the Florida Supreme Court violated *Clemons* by affirming Herring's death sentence without conducting an adequate harmless error analysis. In his motion for a rehearing Herring asserted that the Florida Supreme Court committed constitutional error in affirming his death sentence and cited *Clemons*. *Id.* at 1343. In holding Herring's *Clemons* claim procedurally barred, the Eleventh Circuit focused on the fact that Herring's argument in his habeas petition with respect to his *Clemons* claim was different from the argument he made in his motion for a rehearing:

> Importantly, although Herring challenged the court's finding of harmless error, he did not assert

> the court *failed to engage in* harmless error analysis. Indeed, Herring asserted the Florida Supreme Court had engaged in harmless error review, but argued the court erred in its finding of harmlessness.

Id. at 1344.

The Eleventh Circuit's finding of procedural default of Herring's *Clemons* claim confuses the difference between preserving a claim and asserting an argument in support of that claim, a difference recognized by this Court in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992). In *Yee*, this Court stated, "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534. This court further held that "[h]aving raised a taking claim in the state courts ... petitioners could have formulated any argument they liked in support of that claim." *Id* at 535.

The arguments in Herring's motion for a rehearing and his habeas petition are asserted in support of a single claim: that his rights under the Eighth and Fourteenth Amendments, as construed by this Court in *Clemons* v. *Mississippi*, were violated. Because Herring properly preserved his *Clemons* claim by stating it at the earliest possible opportunity, in his motion for a rehearing before the Florida Supreme Court, it was error for the Eleventh Circuit to deem Herring's *Clemons* claim procedurally barred. See *Yee*, 503 U.S. at 535.

As former federal prosecutors/judges, we appreciate that in the interest of judicial economy it is important that procedural rules be applied and heeded with rigor. At the same time, we believe it is deplorable, in a capital proceeding, to deny habeas review of a meritorious federal claim based on an erroneous interpretation and application of procedural default rules. It is incumbent upon federal courts, when reviewing habeas petitions in capital cases, to ensure that the defendant has a legitimate opportunity to present his federal

claims to the federal judiciary. Federal courts must exercise an especially high degree of scrutiny when interpreting procedural default rules during habeas review of capital proceedings to ensure that those rules are not improperly invoked to deny meritorious federal claims. The finality of the death penalty demands nothing less.

II. HERRING WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the death penalty is qualitatively different from a sentence of imprisonment, however long.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. *North Carolina*, 428 U.S. 280, 304-305 (1976) (internal citations omitted).

The death penalty is unique in its finality. It is essential to any principled legal system that if the death penalty is to be imposed at all, it must be administered reliably on an individualized basis, see *id.* at 305, and in a manner that is neither arbitrary nor capricious, see *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). A fundamental goal of any death penalty system must be to separate those cases where the death penalty is morally appropriate from those where it is not. See *Woodson*, 428 U.S. at 304-305. Realization of this goal re-

quires that the judge or jury, during the sentencing phase of a capital proceeding, possess the fullest information possible pertaining to the defendant's life history and personal characteristics. *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (citing *Williams* v. *New York*, 337 U.S. 241, 247 (1949)).

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court analogized the sentencing phase of a capital proceeding to the guilt phase of a criminal trial. *Id.* at 686-87. Speaking for the Court, Justice O'Connor stated that, like a trial, the capital sentencing phase should follow an adversarial format, there should be standards for decision, and counsel's role in the proceeding should be comparable to counsel's role at trial—*i.e.*, counsel must "...ensure that the adversarial testing process works to produce a just result under the standards governing decision."[5] *Id.* at 687. Defense counsel therefore has a duty during sentencing to make reasonable investigations to discover all available mitigating evidence. See *id.* at 690-91; *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000); *Wiggins* v. *Smith*, 539 U.S. 510, 533-34

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[5] As one scholar has observed,

> As an advocate ... defense counsel has the ... distinct function of attempting to persuade the jury to exercise mercy. Defense counsel therefore has both the opportunity and the duty to present potentially beneficial mitigating evidence and to attempt to convince the sentencer that, notwithstanding the defendant's guilt, he or she is a person who should not die. Once the defendant has been found guilty of a capital crime, a life sentence is counsel's only remaining advocacy goal. As an advocate for life, counsel must attempt to demonstrate that mitigating factors outweigh aggravating factors and must present the sentencer with the most persuasive possible case for mercy.

Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 318 (1983).

(2003) *Rompilla* v. *Beard*, 125 S. Ct. 2456, 2466 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

Indeed, strategic choices to discontinue an investigation into potential mitigating evidence are reasonable only "to the extent that reasonable professional judgments support limitations on investigation."[6] *Strickland*, 466 U.S. at 690-91. When counsel's investigation or presentation of mitigating evidence fall short of "an objective standard of reasonableness," so as to render counsel's representation ineffective, the defendant has been deprived of the right to counsel guaranteed him by the Sixth Amendment. See *id.* at 687-88.

In *Williams* v. *Taylor*, trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood," 529 U.S. at 395-96, as well as "evidence that [the defendant] was 'borderline mentally retarded.'" *Id.* at 363. This Court held that trial counsel's failure to investigate could not be justified as tactical and "clearly demonstrate[d] that trial counsel did not fulfill their *obligation to conduct a thorough investigation* of the defendant's background." *Id.* at 396 (emphasis added). Similarly, in *Wiggins* v. *Smith*, where counsel were aware of some aspects of the defendant's background, but elected to "limit the scope of their investigation into potential mitigating evidence," 539 U.S. at 521, this

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[6] The American Bar Association (ABA) has recognized that at no time is the thoroughness of defense counsel's investigation into a client's background more critical than in preparation for the penalty phase of a capital case. *See* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.7 (rev. ed. 2003) ("This duty is intensified... by the unique nature of the death penalty[.]").

Court held that "counsel's investigation into [the defendant's] background did not reflect reasonable professional judgment" and that their performance during sentencing "suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment." *Id.* at 534.

Quarles' performance during Herring's sentencing fell far short of this Court's standard established by *Williams* and *Wiggins*, and recently reaffirmed in *Rompilla*. The only effort Quarles made to present a mitigating case was to call Herring's mother to the stand, whose testimony filled a meager four pages of transcript. (Ex. 193 at 789.). This decision was made despite the fact that Quarles had in his possession hospital records stating that Herring had signs of "brain dysfunction," "neurological dysfunction," "psychoneurotic disorder," and that he was "undoubtedly functionally retarded." (Ex. 194). These reports also reflect that Herring was emotionally disturbed, unable to function in school, and deprived of emotional support at home. Quarles made no attempt to follow up on these records and reports. Nor did Quarles make an effort to obtain the testimony of a mental health expert to explain to the jury the significance of Herring's mental retardation and brain damage.[7] As an additional consequence of Quarles' failure to investigate, he did not dis-

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[7] The Eleventh Circuit claims that Quarles did investigate Herring's mental condition when he had Herring evaluated by Dr. William Friedenberg, a clinical psychologist. *Herring*, 397 F.3d at 1348. Importantly, Quarles only sought Dr. Friedenberg's assistance to determine whether Herring was competent to stand trial or insane at the time of the offense. Friedenberg was never asked to help prepare for the sentencing phase of the trial. Nor was he consulted on any issue of mitigation. As the Eleventh Circuit itself recognized in *Hardwick* v. *Crosby*, competence to stand trial and sanity at the time of the homicide are guilt-innocence phase issues that do not bear on mitigating circumstances relevant to sentencing. 320 F.3d 1127, 1157 (11th Cir. 2003).

cover a report regarding Herring's full scale I.Q. score of 72, a result consistent with mild mental retardation. (Ex. 195.)[8]

Nor did Quarles conduct any investigation into Herring's background in order to locate witnesses willing to testify about Herring's positive character traits. A reasonable investigation would have revealed a teacher, a child care worker, relatives, and a neighbor of Herring who all knew him well and were willing and ready to testify on his behalf. (Affs. James Breen, Juan Ortega, Gwendolyn Myers, Julia White, and Joan Swillings, attached as exhibits to the first Rule 3.850 motion, dated April 2, 1985).[9] Yet Quarles made no effort to seek out these witnesses.

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[8] Stephen Bright has documented several cases where defense counsel's failure to present available mitigating evidence pertaining to the defendant's intellectual capacity was demonstrated, upon remand for a new trial, to have likely been determinative in the sentencer's decision in the first trial to impose a death sentence. In each of these cases, the defendant received a death sentence in the first trial and then appealed on ineffective assistance of counsel grounds. When evidence of the defendant's mental condition was presented in the new trial, the death sentence was not imposed. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) (referring to *Holloway* v. *State*, 361 S.E.2d 794, 796 (Ga. 1987), *Smith* v. *Zant*, 887 F.2d 1407 (11th Cir. 1989), and *Thomas* v. *Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986)).

[9] A former teacher of Herring would have testified that Herring was a non-violent, non-aggressive, and vulnerable boy. (Aff. James Breen (Ex. 48)). A former child-care worker who took care of Herring while he was treated at a special facility for emotionally disturbed boys would have described Herring's efforts to improve despite his learning disabilities. (Aff. Juan Ortega (Ex. 49)). Herring's younger sister would have testified that Herring protected her and cared for her while their mother was in the hospital, and that they attended church together, and that Herring sang in the

Quarles thus failed to fulfill his "obligation to conduct a thorough investigation of [Herring's] background." See *Williams*, 529 U.S. at 396. Given the ease with which Herring's appellate counsel was able to collect substantial and significant mitigating evidence, it is clear that Quarles' investigation into mitigating evidence fell far short of an "objective standard of reasonableness." See *Strickland*, 466 U.S. at 687-688. Although it is permissible for counsel to determine that further investigation of mitigating evidence would not be fruitful, this is true only "...to the extent that reasonable professional judgments support limitations on investigation." No such rationale existed here. Quarles did not claim he conducted a thorough investigation and made a strategic decision not to offer more evidence in mitigation. Quite to the contrary, Quarles, who had never tried a capital case before, admitted that he was responsible for investigating the mitigating and aggravating circumstances in Herring's case and that he did "a lousy job." (Ex. 149 at 556-67.)

The jurisprudence of this Court establishes a capital defendant's constitutional right to individualized sentencing. See *Woodson*, 428 U.S. at 304-305; *Lockett*, 438 U.S. at 604; *Williams*, 529 U.S. at 363; *Wiggins*, 539 U.S. at 521. In asserting that right, the defendant depends on his counsel's diligence in investigating and presenting mitigating evidence. When defense counsel neglects his obligation to present the strongest possible mitigating case on behalf of his client, as was the case here, he leaves his client's fate to be determined by a sentencer who lacks adequate information to make such

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choir and was an usher. (Aff. Gwendolyn Myers (Ex. 50)). Herring's godmother would have described the very difficult environment in which Herring grew up and his affectionate personality. (Aff. Julia White (Ex. 51)). A neighbor, a registered nurse, would have supported his family's description of Herring's affectionate personality, and that Herring performed volunteer work for her. (Aff. Joan Swillings (Ex. 52).

a determination.[10] When such neglect is overlooked by the courts, the imposition of the death penalty will not be imposed reliably on an individualized basis, but rather arbitrarily and capriciously, which this Court has held unconstitutional. See *Gregg*, 428 U.S. at 188.

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[10] Professor Goodpaster explains that defense counsel's failure to present available mitigating evidence will also have implications for subsequent proceedings:

> By presenting all available mitigating evidence, defense counsel also enables appellate courts (and the trial court, for jury-imposed sentences) to exercise meaningful proportionality review. Obviously, such review can promote similar results in similar cases only if the essential aggravating and mitigating facts in capital cases can be examined and compared. By failing to develop and present a mitigating case, counsel may preclude judicial consideration and review of factors relevant to determining whether a particular death sentence is disproportionate.

Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 318 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DOCKET NO. 05-16

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should exercise its certiorari jurisdiction to review issues that were correctly decided by the Eleventh Circuit Court of Appeals, which are fact-specific in nature, and which are of insufficient importance to warrant the exercise of this Court's certiorari jurisdiction?

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DOCKET NO. 05-16

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

CITATION TO OPINION BELOW

The Eleventh Circuit Court of Appeals decision affirming the denial of habeas corpus relief was issued on January 31, 2005, and is reproduced at A-1 through A-34. Herring's motion for rehearing and for rehearing *en banc* was denied on March 29, 2005, and is reproduced at A-35.[1]

STATEMENT OF JURISDICTION

Herring asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). The Respondents agree that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but respectfully submit that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

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[1]Opinions of other Courts are quoted or cited as appropriate.

CONSTITUTIONAL PROVISIONS INVOLVED

Herring asserts that the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States are at issue in this proceeding.

STATEMENT OF THE CASE

On pages 2-7 of the petition, Herring sets out an argumentative version of the history of this case which contains no citation to any reported decision. The Respondents rely upon the following statement of the facts of this case, which is taken from the opinion of the Eleventh Circuit Court of Appeals:

> A. *Factual Background*
>
> On May 29, 1981, Herring held up a 7-Eleven convenience store in Daytona Beach. Herring shot and killed the store clerk. A hold-up note was found at the scene. At some point, the police determined that Herring's fingerprint was on the note. The murder weapon was never found.
>
> After the robbery, Herring was arrested on charges relating to a stolen car and was taken to the Daytona Beach Police Station. He waived his *Miranda* rights and made three statements, in two of which he confessed to the robbery and homicide at the 7-Eleven store. Three officers were involved in the interrogations.
>
> In his first statement, which was taped, Herring told the officers he went to the store with the intent to commit a robbery, but before he could commit the crime, a second man robbed the store and killed the clerk. In a second, unrecorded

statement made privately to Detective Varner, Herring stated he shot the clerk in the head and then, while the clerk was lying on the ground, shot the clerk a second time to eliminate him as a witness. In a final, taped statement to the officers, Herring claimed he robbed the store and only accidentally shot the clerk when he thought the clerk was coming across the counter. Herring stated he shot the clerk a second time out of fear.

B. *Procedural Background*

In February 1982, Herring was tried in Volusia County for armed robbery and first-degree murder. He was represented by two public defenders: Howard Pearl and Peyton Quarles. Pearl handled the guilt phase of the trial and Quarles handled the penalty phase.

Detective Varner testified at the guilt phase regarding Herring's unrecorded statement. Following Varner's direct testimony, Pearl cross-examined him on the length of interrogation and whether Herring received food or time to rest during the interrogation. Pearl similarly cross-examined the two other officers involved in questioning Herring. Herring testified on his own behalf, relating his initial story -- that he planned to commit the robbery, but another person beat him to it and killed the clerk.

The jury found Herring guilty on both counts against him. The penalty phase followed. The only witness testifying in mitigation was Herring's mother, Dorothy Meyers. The jury

returned an advisory sentence of death by an eight-to-four vote.

The trial judge sentenced Herring to death. In aggravation, the trial judge found and considered as aggravating circumstances: (1) "the Defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;" (2) "the crime for which the Defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery;" (3) "the crime for which the Defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;" and (4) "the crime for which this Defendant was to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." In mitigation, the trial judge found and considered as mitigating circumstances: (1) the Defendant was 19 years old at the time of the crime; and (2) "Defendant had a difficult childhood," *i.e.*, "Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble in school." The Florida Supreme Court affirmed Herring's convictions and death sentence on direct appeal.

In April 1985, Herring filed his first Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief. The state trial court denied the motion and the Florida Supreme Court affirmed. In March 1987, Herring filed a petition in the Florida Supreme Court for a writ of habeas corpus. The Florida Supreme Court denied relief.

Herring then filed a petition in federal court under 28 U.S.C. § 2254 for a writ of habeas corpus. The district court dismissed the petition without prejudice due to Herring's failure to exhaust his state court remedies.

In 1989, Herring filed a second Rule 3.850 motion, claiming, *inter alia*, that his death sentence should be vacated under *Rogers* v. *State*, 511 So. 2d 526, 533 (Fla. 1987), which declared the premeditation aggravator inapplicable to cases like Herring's. The state trial court denied relief under *Rogers*. The court did, however, grant Herring leave to amend his motion to add a claim that Pearl operated under an impermissible conflict of interest in serving both as Herring's trial counsel and as a special deputy sheriff. The trial court denied the amended motion. The Florida Supreme Court held the premeditation aggravating factor should not have been applied, but affirmed without granting a new sentencing hearing. On the conflict-of-interest claim, the court remanded for an evidentiary hearing.

On remand, Herring's conflict-of-interest claim was consolidated for hearing with similar claims raised by other defendants who had been represented by Pearl. The state trial judge denied relief. The Florida Supreme Court remanded for individual hearings on the appealed cases, including Herring's. The state trial court held a second hearing and again denied Herring's conflict-of-interest claim. The Florida Supreme Court affirmed.

Herring filed a § 2254 petition for a writ of

habeas corpus in federal district court. The district court denied relief and denied a COA.This Court granted a COA on three issues:

> (1) Whether the Florida Supreme Court acted contrary to *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) and violated the Eighth and Fourteenth Amendments in upholding Herring's sentence despite the elimination of the heightened premeditation aggravating circumstance;
>
> (2) Whether Herring was deprived of the effective assistance of counsel at the sentencing phase of his criminal trial; and
>
> (3) Whether, in evaluating Howard Pearl's conflict of interest under the Sixth Amendment, the state courts unreasonably applied *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) to the facts of Herring's case.

Herring v. Secretary, Department of Corrections, 397 F.3d 1338, 1340 (11th Cir. 2005).[2]

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[2]The Conflict of interest claim is not raised in the petition.

REASONS WHY THE WRIT SHOULD BE DENIED

On pages 7-30 of the petition, Herring argues three grounds which, he claims, justify the exercise of this Court's discretionary jurisdiction. However, the Eleventh Circuit Court of Appeals correctly decided each ground for relief that was before it, and properly denied a certificate of appealability as to the ground that was not. Despite Herring's criticisms of the Eleventh Circuit, that Court properly applied settled habeas law, and affirmed the denial of relief.

I. THE *CLEMONS* CLAIM WAS PROPERLY DECIDED ON PROCEDURAL GROUNDS.

On pages 10-17 of the petition, Herring argues that the decisions of the Florida Supreme Court and the Eleventh Circuit Court of Appeals "are directly contrary to" this Court's *Clemons* and *Sochor* decisions. However, Herring does not explain how that can be so -- the Eleventh Circuit decided this claim on procedural grounds, and did not reach the merits of the *Clemons* issue. Despite the assertions contained in the petition, the Eleventh Circuit properly decided this claim based upon Herring's multiple procedural defaults, the first based upon the fundamental appellate practice tenet that issues cannot be raised for the first time in a reply brief, and the second based upon Herring's failure to properly preserve the *Clemons* issue raised in the federal habeas corpus proceeding.

In affirming the denial of relief based on the *Clemons* claim, the Eleventh Circuit held:

> Herring contends that when the Florida Supreme Court struck the heightened premeditation aggravating circumstance but nevertheless affirmed his death sentence, it failed to conduct any of the three analyses set out as permissible in

Clemons. In response, the State argues: (1) Herring's claim is procedurally barred; (2) Herring's claim alleges nothing more than an error of state law and therefore is not cognizable in federal habeas corpus; and (3) Herring received all the process he was due. The district court rejected Herring's claim on two bases, one of which was that the claim was procedurally barred.

Herring did not present any arguments pertaining to procedural bar in his initial brief. In his reply brief, however, Herring argues his *Clemons* claim is not procedurally barred because he did present his *Clemons* argument to the Florida Supreme Court during proceedings on his second 3.850 motion and the Florida Supreme Court reached the merits of his claim.FN1 As we repeatedly have admonished, "arguments raised for the first time in a reply brief are not properly before a reviewing court." *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994) (citation omitted); *see also United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (Court need not address issue raised for first time in reply brief), *cert. denied*, 539 U.S. 951, 156 L. Ed. 2d 643, 123 S. Ct. 2628 (2003); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (issue raised for first time in reply brief waived); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996) (declining to consider arguments raised for the first time in a reply brief). Although Herring's failure to present his procedural bar argument in his initial brief is determinative, we nevertheless briefly discuss procedural bar and the arguments Herring raises in his reply brief.

> FN1 We note Herring does not argue in the alternative that there is cause and prejudice excusing his procedural default or that, if raised for the first time in state court now, it would not be barred under state law procedural bar principles.

"A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claims in federal court absent a showing of cause for and actual prejudice from the default." *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506-07, 53 L. Ed. 2d 594 (1977)). This procedural default arises in two situations: (1) where the state court itself correctly applies state law procedural bar principles to conclude a federal claim is barred; and (2) where a claim was never raised in state court, and it is clear the unexhausted claim would now be barred under state law procedural bar principles. *Id.* at 1302-03 (citations omitted). The State's argument is that Herring's *Clemons* claim falls within the second category. We agree.

Herring challenged the application of the cold, calculated, and premeditated aggravating factor in his direct appeal.

Herring again challenged the application of the aggravating factor in his initial brief appealing the denial of his second Rule 3.850 motion, and argued a new sentencing hearing should be

conducted. In his reply brief to the Florida Supreme Court, Herring argued the jury's improper consideration of the heightened aggravating factor could not be harmless beyond a reasonable doubt. Herring further stated:

> Indeed, because "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances," *Elledge*, 346 So. 2d at 1003, this Court has consistently ordered new sentencing hearings in similar cases. . . . The result here should be no different. *Cf. Clemons v. Mississippi*, 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, 58 U.S.L.W. 4395, 4399-4400 & n.5 (Mar. 28, 1990) (failure to remand to a sentencing jury violates the Constitution "if the decision is made arbitrarily").

The Florida Supreme Court struck the challenged aggravating factor, but affirmed Herring's death sentence stating:

> While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing

> in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a 'conviction of a prior crime of violence' had been eliminated, that would have changed the facts and circumstances before the jury.
>
> The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.

Herring v. State, 580 So. 2d 135, 138 (Fla. 1991) (citations omitted).

In his motion for a rehearing, Herring made three arguments as to why the Florida Supreme Court's decision was incorrect. Herring first argued the court committed constitutional error in that it failed to apply its "long-standing rule" of remanding for a new sentencing hearing when it strikes one or more aggravating circumstances relied on at sentencing and mitigating circumstances are present. Herring cited *Clemons* in this section of his motion, including again a parenthetical stating that "failure to remand to a sentencing jury violates the Constitution 'if the decision is made arbitrarily.'" In its response, the State pointed out that in *Clemons*, the Supreme Court "established that state courts may conduct a harmless error analysis if an aggravating circumstance is stricken." Herring acknowledged as much in his second argument -- that the Florida Supreme Court's "finding of harmless error [could not] be squared with the facts of the case."FN2 Importantly, although Herring challenged the court's finding of harmless error, he did not assert the court *failed to engage in* harmless error analysis. Indeed, **Herring asserted the Florida Supreme Court had engaged in harmless error review, but argued the court erred in its finding of harmlessness.** Herring's third argument was that the court's opinion "appears to announce a new rule" that the erroneous application of a statutory aggravator may be deemed harmless where elimination of the circumstance does not alter the facts and circumstances regarding how the defendant committed the murder, and thereby "calls into

question the constitutionality, as applied, of Florida's capital sentencing scheme."FN3

> FN2Herring cited *Clemons* in this section of his motion as support for his contention that "the circumstances surrounding both Herring's crime and his sentencing hearing make clear that the erroneous application of the heightened premeditation aggravating circumstance cannot be deemed harmless beyond a reasonable doubt."
>
> FN3With respect to this final point, Herring contended:
>
> In a case involving substantial mitigation, it is simply impossible to know how the sentencers would have performed the weighty, yet delicate, task of balancing the aggravating and mitigating factors in the absence of one of the aggravating factors. To suggest that the presence or absence of one of the aggravating factors in such a case makes no difference in the weighing process threatens to return the Florida statutory scheme to the "standardless discretion" condemned in *Furman*.

> After reviewing Herring's state court filings, we conclude that, although Herring made many arguments pertaining to the cold, calculated, and premeditated aggravator, **he did not preserve the argument he now makes -- that the Florida Supreme Court erred in affirming his sentence after striking the factor without performing the analysis set out by the United States Supreme Court in *Clemons* -- and the Florida Supreme Court did not consider such a claim.**
>
> In summary, we affirm the district court's denial of Herring's claim. The district court found Herring's claim to be procedurally barred. **Herring failed to argue the procedural bar issue in his initial brief.** Even if the arguments set out in Herring's reply brief had properly been presented in his initial brief, we would have rejected them.FN4
>
> > FN4 For the first time, in a supplemental letter brief, Herring asserts additional procedural bar arguments. "Parties cannot properly raise new issues at supplemental briefing. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (citation omitted).

Herring, supra, at 1342-1344. (italics in original; emphasis added).[2] The Eleventh Circuit correctly decided this claim on

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[2]In an apparent effort to excuse his failure to address the District Court's procedural default finding in his initial brief, Herring asserts that his "initial brief was predicated on the threshold issue that his *Clemons* claim was

independently adequate procedural grounds, and the issue contained in the petition is unworthy of this Court's certiorari jurisdiction.[3]

The internal inconsistency of Herring's position with respect to the procedural default finding (separate and apart from his failure to properly brief that issue) likewise renders this case inappropriate for certiorari review. As the Eleventh Circuit pointed out, Herring "asserted that the Florida Supreme Court had engaged in harmless error review, but argued the court **erred in its finding of harmlessness.**" *Herring, supra.* Given that *Clemons* explicitly **allows** harmless error review under these facts, it stands reason on its head to suggest that this argument preserved the present argument that the Florida Supreme Court did **not** follow *Clemons.* To hold as Herring would have this Court do would be to hold that every argument also preserves its converse argument -- that result finds no support in the law, and makes no sense. This claim is inappropriate for, and undeserving of, this Court's review.

To the extent that further discussion of this claim is necessary, the claim contained in the petition is highly fact specific, and has none of the importance necessary to warrant the exercise of this Court's discretionary jurisdiction. *Rice v. Sioux*

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not defaulted." *Petition*, at 17 n.6. Given that the District Court explicitly denied relief on procedural default grounds, that argument is too clever by half.

[3]Contrary to Herring's claim, *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005) worked no modification of settled procedural law, which was applied in this case by the Eleventh Circuit. That case is of no help to Herring, and his reliance on it is misplaced. No case cited by Herring supports the notion that the Eleventh Circuit did anything other than apply procedural default law correctly to preclude review of a claim that Herring never raised in State Court.

City Cemetery, 349 U.S. 70, 79 (1950); Supreme Court Rule 10. The petition should be denied.

II. THE INEFFECTIVENESS OF COUNSEL CLAIM WAS CORRECTLY DECIDED.

On pages 18-25 of the petition, Herring asserts that the Eleventh Circuit "unreasonably applied" *Strickland* in affirming the denial of relief on the ineffectiveness of penalty phase counsel claim, and that, in doing so, that Court engaged in "improper appellate fact-finding." Herring's argument appears to be based on the premise that the Court of Appeals sits as a sort of super-District Court, instead of recognizing that that Court reviews the decision of the District Court under the strictures of the AEDPA, with its heightened standards of deference for State Court rulings. Contrary to Herring's claims, the Eleventh Circuit correctly found that the rulings of the State post-conviction trial judge were neither contrary to, nor an unreasonable application of, clearly established federal law.

In affirming the denial of relief on this claim, the Eleventh Circuit reviewed the applicable standard of review under the AEDPA, and stated:

> The state trial court judge who issued a ruling on Herring's ineffective-assistance-of-counsel claim is the same judge who presided at trial. The state trial judge was, therefore, intimately aware of everything that happened at, and was involved in, the trial. In an attempt to obtain similar familiarity, we have reviewed the entire record. It is evident from our review that the state court rulings were eminently reasonable and were not contrary to clearly established federal law.

> We turn first to Herring's contention that Quarles did not perform a meaningful investigation into his mental condition. The state courtFN6 concluded Herring established neither deficient performance nor prejudice. The record supports the state court conclusions.
>
> > FN6 The Florida Supreme Court expressly stated it agreed with the trial judge's findings. We use the term "state court" in this discussion to refer to the state trial court and the Florida Supreme Court.

Herring, supra, at 1347-48. The Eleventh Circuit then reviewed the facts contained in the record, and concluded that:

> Upon review of the record before the state courts, the state court resolution of Herring's claims was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and did not result in a decision that was based on an unreasonable determination of the facts.

Id., at 1350.

The Eleventh circuit also reviewed and summarized the findings of the District Court, and concluded that:

> Although the district court did not hold a hearing on Herring's ineffective-assistance-of-counsel claim, such treatment of a claim is appropriate where, as here, "a hearing would not assist in the resolution of [petitioner's] claims." *Breedlove v.*

Moore, 279 F.3d 952, 960 (11th Cir.) (citation omitted), *reh'g and reh'g en banc denied*, 48 Fed. Appx. 329 (11th Cir. 2002), *cert. denied*, 537 U.S. 1204, 154 L. Ed. 2d 1047, 123 S. Ct. 1278, reh'g denied, 538 U.S. 995, 155 L. Ed. 2d 699, 123 S. Ct. 1825 (2003).

Applying the deferential § 2254 standard of review, the district court correctly affirmed the state court decisions. As set out in Part II.C.1.a. above, the state court decisions were supported by the record before those courts. We further note the district court had before it not only the record that was before the state courts in resolving these issues, but also the record of additional post-conviction proceedings in this case. Nothing in the record of these additional post-conviction proceedings undermines the state court decisions.

Most notably, the post-conviction record includes a December 1991 deposition of Quarles that was taken by Herring's current counsel during proceedings on Herring's claim that Pearl had acted at trial under an impermissible conflict of interest. In his deposition, Quarles stated his theory originally was to get Herring to plead guilty. He said the trial judge had indicated that if Herring pled guilty, he would receive a life sentence. (In his own December 1992 deposition, Pearl testified that he had a similar recollection.) When Herring refused to plead guilty, Quarles' tactic was to try to convince the jury that Herring was young and ignorant.

In terms of investigation, Quarles stated that he talked to Herring about "possible witnesses,

events in his life, relatives." Quarles also testified that he had Herring examined and "a report was produced." He testified that he did not know how to get the childhood reports regarding Herring's mental condition admitted: "I made some attempt to talk to a doctor or two that had examined him and either I couldn't locate them or they had other information or they had other testimony that was detrimental to call as a witness." When questioned specifically about a report from St. Luke's Hospital, Quarles further stated;

> I can't specifically say what I did or if I was able to locate the doctor. I do know that I attempted to locate some doctors, could not -- was unsuccessful as to one or two or one. It seems to me there was some doctor somewhere, maybe here, that was definitely going to throw in Mr. Herring despite this and this and this, Mr. Herring knew exactly what he was doing and Mr. Herring intended to kill Mr. Heolzelg [sic].

With respect to investigating and presenting character witnesses, Quarles stated that, through his discussions with Herring and Meyers, he concluded there was no one who could attend the trial who might be a good character witness on Herring's behalf.

Again, the state court rulings were sustainable on the record that was before the state courts in

> ruling on Herring's claims. Moreover, the additional post-conviction record before the district court does nothing to undermine those rulings. We affirm the district court's denial of Herring's claims.

Id., at 1351-52. Far from being "improper appellate factfinding," the decision of the Eleventh Circuit represents a careful, conscientious, and correct application of the AEDPA to this case. The Circuit Court decided the ineffectiveness claim correctly, and this claim is inappropriate for the exercise of this Court's discretionary jurisdiction.

To the extent that further discussion of this claim is necessary, the claim contained in the petition is highly fact specific, and has none of the importance necessary to warrant the exercise of this Court's discretionary jurisdiction. *Rice v. Sioux City Cemetery*, *supra*; Supreme Court Rule 10. The petition should be denied.

Finally, to the extent that Herring relies on *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) as support for his position, those cases do not present the factual situation present in this case. Neither of those decisions worked a change in the law, but rather are based on *Strickland,* which was applied by the Court of Appeals. *Wiggins* and *Rompilla* do not compel a different result. When the speculation of Herring's petition is stripped away, there is no basis for the exercise of this Court's certiorari jurisdiction.

III. THE CLAIM FOR WHICH THE ELEVENTH CIRCUIT REFUSED TO GRANT A CERTIFICATE OF APPEALABILITY IS PROCEDURALLY DEFAULTED.

On pages 26-30 of the petition, Herring argues that the Eleventh Circuit was wrong to refuse to grant a certificate of appealability with respect to his claim that a *Miranda* violation occurred in connection with an interview conducted by Herring's probation officer. In a remarkably misleading bit of advocacy, Herring asserts that he raised this issue as a substantive claim, and that the Florida Supreme Court decided the claim on the merits. *Petition,* at 26-27. That is not the true posture of the "*Miranda* claim," and the correctness of the Eleventh Circuit's ruling, and the inappropriateness of this issue for certiorari review, is shown by the history of this case.

In an effort to attack the procedural default finding of the District Court, Herring cites this Court to *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988), for the proposition that the Florida Supreme Court decided this claim on the merits. The true facts are that the issue before the Florida Supreme Court was a claim that **appellate** counsel was ineffective for not **raising** the *Miranda*-based claim. In denying relief, the Florida Supreme Court held:

> We find the statement was clearly admissible and, consequently, appellate counsel was not deficient in failing to raise this issue.

Herring v. Dugger, 528 So. 2d at 1176, 1178 (Fla. 1988). While the Court did state that the statement was admissible, the admissibility *vel non* of the statement was not the issue before it -- Herring had pleaded a stand-alone claim of ineffectiveness of appellate counsel, and **that** was the issue that the State Court ultimately decided. The quoted language, which is what Herring has based his claim on, is not a merits ruling that reverse a prior State procedural bar finding.

The District Court, quite correctly, decided the substantive claim that was before it, which was the same claim

that had been raised in the Florida Supreme Court and held procedurally barred by that Court because it could have been but was not raised on direct appeal. *Pet. App.* at 118-19; *Herring v. State*, 501 So. 2d at 1279-80. The District Court correctly enforced Florida's settled procedural default rules, and that ruling was properly respected by the Eleventh Circuit. Given the clarity of the procedural default (which is not open to debate), there is no showing that reasonable jurists could debate whether the petition could have been resolved differently, and, because that is so, there is no basis which would support the granting of a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473 (2000). The denial of the certificate of appealability was the correct result under these facts, and is an issue that is unworthy of this Court's certiorari jurisdiction.

To the extent that further discussion of this claim is necessary, the claim contained in the petition is highly fact specific, and has none of the importance necessary to warrant the exercise of this Court's discretionary jurisdiction. *Rice v. Sioux City Cemetery*, *supra*; Supreme Court Rule 10. The petition should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondents respectfully submit that the petition for writ of certiorari should be denied in all respects.

Respectfully submitted,

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DOCKET NO. 05-16

IN THE SUPREME COURT OF THE UNITED STATES

TED HERRING,
Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

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Court of Appeals, Eleventh Circuit,
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TED HERRING, Petitioner-Appellant,
versus
SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents-Appellees.

No. 03-12598

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

January 31, 2005, Decided

JUDGES: Before BIRCH, DUBINA and BLACK, Circuit Judges.

OPINION: BLACK, Circuit Judge:

Appellant Ted Herring filed a habeas petition under 28 U.S.C. § 2254 challenging his 1982 state-court convictions for armed robbery and first-degree murder, and his resulting death sentence. The district court denied Herring's petition. We granted a certificate of appealability (COA) on three issues. We now affirm.

I. BACKGROUND

A. *Factual Background*

On May 29, 1981, Herring held up a 7-Eleven convenience store in Daytona Beach. Herring shot and killed the store clerk. A hold-up note was found at the scene. At some point, the police determined that Herring's fingerprint was on the note. The murder weapon was never found.

After the robbery, Herring was arrested on charges relating to a stolen car and was taken to the Daytona Beach Police Station. He waived his Miranda rights and made three statements, in two of which he confessed to the robbery and homicide at the 7-Eleven store. Three officers were involved in the interrogations.

In his first statement, which was taped, Herring told the officers he went to the store with the intent to commit a robbery, but before he could commit the crime, a second man robbed the store and killed the clerk. In a second, unrecorded statement made privately to Detective Varner, Herring stated he shot the clerk in the head and then, while the clerk was lying on the ground, shot the clerk a second time to eliminate him as a witness. In a final, taped statement to the officers, Herring claimed he robbed the store and only accidentally shot the clerk when he thought the clerk was coming across the counter. Herring stated he shot the clerk a second time out of fear.

B. *Procedural Background*

In February 1982, Herring was tried in Volusia County for armed robbery and first-degree murder. He was represented by two public defenders: Howard Pearl and Peyton Quarles. Pearl handled the guilt phase of the trial and Quarles handled the penalty phase.

Detective Varner testified at the guilt phase regarding Herring's unrecorded statement. Following Varner's direct testimony, Pearl cross-examined him on the length of interrogation and whether Herring received food or time to rest during the interrogation. Pearl similarly cross-examined the two other officers involved in questioning Herring. Herring testified on his own behalf, relating his initial story -- that he planned to commit the robbery, but another person beat him to it and killed the clerk.

The jury found Herring guilty on both counts against him. The penalty phase followed. The only witness testifying in mitigation was Herring's mother, Dorothy Meyers. The jury returned an advisory sentence of death by an eight-to-four vote.

The trial judge sentenced Herring to death. In aggravation, the trial judge found and considered as aggravating circumstances: (1) "the Defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;" (2) "the crime for which the Defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery;" (3) "the crime for which the Defendant was to be sentenced

was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;" and (4) "the crime for which this Defendant was to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." In mitigation, the trial judge found and considered as mitigating circumstances: (1) the Defendant was 19 years old at the time of the crime; and (2) "Defendant had a difficult childhood," *i.e.*, "Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble in school." The Florida Supreme Court affirmed Herring's convictions and death sentence on direct appeal.

In April 1985, Herring filed his first Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief. The state trial court denied the motion and the Florida Supreme Court affirmed. In March 1987, Herring filed a petition in the Florida Supreme Court for a writ of habeas corpus. The Florida Supreme Court denied relief. Herring then filed a petition in federal court under 28 U.S.C. § 2254 for a writ of habeas corpus. The district court dismissed the petition without prejudice due to Herring's failure to exhaust his state court remedies.

In 1989, Herring filed a second Rule 3.850 motion, claiming, inter alia, that his death sentence should be vacated under *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), which declared the premeditation aggravator inapplicable to cases like Herring's. The state trial court denied relief under Rogers. The court did, however, grant Herring leave to amend his motion to add a claim that Pearl operated under an impermissible conflict of interest in serving both as Herring's trial counsel and as a special deputy sheriff. The trial court denied the amended motion. The Florida Supreme Court held the premeditation aggravating factor should not have been applied, but affirmed without granting a new sentencing hearing. On the conflict-of-interest claim, the court remanded for an evidentiary hearing.

On remand, Herring's conflict-of-interest claim was consolidated for hearing with similar claims raised by other defendants who had been represented by Pearl. The state trial judge denied relief. The Florida Supreme Court remanded for individual hearings on the appealed cases, including Herring's. The state trial court held a second hearing

and again denied Herring's conflict-of-interest claim. The Florida Supreme Court affirmed.

Herring filed a § 2254 petition for a writ of habeas corpus in federal district court. The district court denied relief and denied a COA. This Court granted a COA on three issues:

> (1) Whether the Florida Supreme Court acted contrary to *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) and violated the Eighth and Fourteenth Amendments in upholding Herring's sentence despite the elimination of the heightened premeditation aggravating circumstance;
>
> (2) Whether Herring was deprived of the effective assistance of counsel at the sentencing phase of his criminal trial; and
>
> (3) Whether, in evaluating Howard Pearl's conflict of interest under the Sixth Amendment, the state courts unreasonably applied *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) to the facts of Herring's case.

II. DISCUSSION

A. *Standard of Review Under 28 U.S.C. § 2254*

Our habeas review of a state court's rulings is restricted by § 2254, as amended by the *Antiterrorism and Effective Death Penalty Act of 1996* (AEDPA). Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000). A state court's decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1) if its application is objectively unreasonable. *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001). "An *unreasonable* application of federal law is different from an incorrect or erroneous application of federal law." *Williams*, 529 U.S. at 412, 120 S. Ct. at 1523.

A federal court's review is further restricted by 28 U.S.C. § 2254(e), which provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. *Claim under* Clemons v. Mississippi

Under the Supreme Court's ruling in *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), HN4when a state appellate court determines a death sentence is based on an invalid or improperly defined aggravating factor, that court may reweigh the aggravating and mitigating evidence, conclude the error was harmless,

or remand for a new sentencing. *Id.* at 741, 754, 110 S. Ct. at 1444, 1451.

Herring contends that when the Florida Supreme Court struck the heightened premeditation aggravating circumstance but nevertheless affirmed his death sentence, it failed to conduct any of the three analyses set out as permissible in *Clemons*. In response, the State argues: (1) Herring's claim is procedurally barred; (2) Herring's claim alleges nothing more than an error of state law and therefore is not cognizable in federal habeas corpus; and (3) Herring received all the process he was due. The district court rejected Herring's claim on two bases, one of which was that the claim was procedurally barred.

Herring did not present any arguments pertaining to procedural bar in his initial brief. In his reply brief, however, Herring argues his *Clemons* claim is not procedurally barred because he did present his *Clemons* argument to the Florida Supreme Court during proceedings on his second 3.850 motion and the Florida Supreme Court reached the merits of his claim. FN1 As we repeatedly have admonished, "arguments raised for the first time in a reply brief are not properly before a reviewing court." *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994) (citation omitted); *see also United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (Court need not address issue raised for first time in reply brief), *cert. denied*, 539 U.S. 951, 156 L. Ed. 2d 643, 123 S. Ct. 2628 (2003); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (issue raised for first time in reply brief waived); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996) (declining to consider arguments raised for the first time in a reply brief). Although Herring's failure to present his procedural bar argument in his initial brief is determinative, we nevertheless briefly discuss procedural bar and the arguments Herring raises in his reply brief.

> FN1 We note Herring does not argue in the alternative that there is cause and prejudice excusing his procedural default or that, if raised for the first time in state court now, it would not be barred under state law procedural bar principles.

"A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claims in federal court absent a showing of cause for and actual prejudice from the default." *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) (*citing Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506-07, 53 L. Ed. 2d 594 (1977)). This procedural default arises in two situations: (1) where the state court itself correctly applies state law procedural bar principles to conclude a federal claim is barred; and (2) where a claim was never raised in state court, and it is clear the unexhausted claim would now be barred under state law procedural bar principles. *Id.* at 1302-03 (citations omitted). The State's argument is that Herring's *Clemons* claim falls within the second category. We agree.

Herring challenged the application of the cold, calculated, and premeditated aggravating factor in his direct appeal.

Herring again challenged the application of the aggravating factor in his initial brief appealing the denial of his second Rule 3.850 motion, and argued a new sentencing hearing should be conducted. In his reply brief to the Florida Supreme Court, Herring argued the jury's improper consideration of the heightened aggravating factor could not be harmless beyond a reasonable doubt. Herring further stated:

> Indeed, because "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances," *Elledge*, 346 So. 2d at 1003, this Court has consistently ordered new sentencing hearings in similar cases. . . . The result here should be no different. *Cf. Clemons v. Mississippi*, 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, 58 U.S.L.W. 4395, 4399-4400 & n.5 (Mar. 28, 1990) (failure to remand to a sentencing jury violates the Constitution "if the decision is made arbitrarily").

The Florida Supreme Court struck the challenged aggravating factor, but affirmed Herring's death sentence stating:

> While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in Herring, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a 'conviction of a prior crime of violence' had been eliminated, that would have changed the facts and circumstances before the jury.
>
> The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.

Herring v. State, 580 So. 2d 135, 138 (Fla. 1991) (citations omitted).

In his motion for a rehearing, Herring made three arguments as to why the Florida Supreme Court's decision was incorrect. Herring first argued the court committed constitutional error in that it failed to apply its "long-standing rule" of remanding for a new sentencing hearing when it strikes one or more aggravating circumstances relied on at sentencing and mitigating circumstances are present. Herring cited *Clemons* in this section of his motion, including again a parenthetical stating that "failure to remand to a sentencing jury violates the Constitution 'if the decision is made arbitrarily.'" In its response, the State pointed out that in *Clemons,* the Supreme Court "established that state courts may conduct a harmless error analysis if an aggravating circumstance is stricken." Herring acknowledged as

much in his second argument – that the Florida Supreme Court's "finding of harmless error [could not] be squared with the facts of the case." FN2 Importantly, although Herring challenged the court's finding of harmless error, he did not assert the court failed to engage in harmless error analysis. Indeed, Herring asserted the Florida Supreme Court had engaged in harmless error review, but argued the court erred in its finding of harmlessness. Herring's third argument was that the court's opinion "appears to announce a new rule" that the erroneous application of a statutory aggravator may be deemed harmless where elimination of the circumstance does not alter the facts and circumstances regarding how the defendant committed the murder, and thereby "calls into question the constitutionality, as applied, of Florida's capital sentencing scheme." FN3

> FN2 Herring cited Clemons in this section of his motion as support for his contention that "the circumstances surrounding both Herring's crime and his sentencing hearing make clear that the erroneous application of the heightened premeditation aggravating circumstance cannot be deemed harmless beyond a reasonable doubt."

> FN3 With respect to this final point, Herring contended:
>
> In a case involving substantial mitigation, it is simply impossible to know how the sentencers would have performed the weighty, yet delicate, task of balancing the aggravating and mitigating factors in the absence of one of the aggravating factors. To suggest that the presence or absence of one of the aggravating factors in such a case makes no difference in the weighing process threatens to return the Florida statutory scheme to the "standardless discretion" condemned in *Furman*.

After reviewing Herring's state court filings, we conclude that, although Herring made many arguments pertaining to the cold,

calculated, and premeditated aggravator, he did not preserve the argument he now makes -- that the Florida Supreme Court erred in affirming his sentence after striking the factor without performing the analysis set out by the United States Supreme Court in *Clemons* -- and the Florida Supreme Court did not consider such a claim.

In summary, we affirm the district court's denial of Herring's claim. The district court found Herring's claim to be procedurally barred. Herring failed to argue the procedural bar issue in his initial brief. Even if the arguments set out in Herring's reply brief had properly been presented in his initial brief, we would have rejected them. FN4

> FN4 For the first time, in a supplemental letter brief, Herring asserts additional procedural bar arguments. "Parties cannot properly raise new issues at supplemental briefing. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (citation omitted).

C. *Claim of Ineffective Assistance of Counsel at Penalty Phase*

Herring next claims he received ineffective assistance of counsel at the penalty phase of his trial. Peyton Quarles represented Herring at the penalty phase. Herring makes a number of allegations of ineffectiveness. Neither the state courts nor the district court held an evidentiary hearing on Appellant's claims.

A petitioner is entitled to relief based on ineffective assistance of counsel when he establishes (1) his counsel's performance fell below an objective standard of reasonableness, and (2) "there is a reasonable probability that, but for counsel's errors and omissions, the result of the proceedings would have been different." *Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001) *(citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Both prongs are mixed questions of law and fact. *Mills v. Singletary*, 161 F.3d 1273, 1285 n.15 (11th Cir. 1998) (citation omitted).

1. *Quarles' failure to present mitigating evidence in his possession and failure to conduct a reasonable investigation*

During the penalty phase, Herring's mother, Dorothy Meyers, was the only witness to testify in mitigation. Herring contends Quarles should have done more in mitigation. Specifically, Herring contends: (1) Quarles was ineffective in that he failed to investigate and present other readily available mitigating evidence pertaining to Herring's mental condition, background, and character; and (2) Quarles was ineffective in that he failed to present mitigating evidence in his possession at the time of trial. Underlying Herring's failure-to-investigate claim is the premise that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003) (*quoting Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066); *see also Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (*citing Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)).

a. *State Court Decisions*

The state trial court held that Herring did not satisfy either prong of the *Strickland* ineffectiveness inquiry. That court concluded:

> 5. The real nub of Defendant's motion is the claim of ineffective trial counsel. Despite the standards set forth in *Knight* and *Strickland* it is very difficult to go back and determine whether trial counsel's actions or inactions amounted to ineffective assistance of counsel. The Court will attempt to deal with the allegations of ineffectiveness and analyze them in light of *Knight* and *Strickland*.
>
> A. In Paragraph "85" of the 3.850 the Defendant alleges there were reports (see Defendant's exhibits "3" and "4") that the Defendant had serious mental and emotional problems. The Defendant now complains these reports should have been introduced. First it should be noted that at least one of the reports

was a result of an interview done when the Defendant was 13 years old. Secondly, the defense did establish learning disabilities and psychological problems through the testimony of the Defendant's mother. Thirdly, one of the reports indicates the mother, who was a defense witness and represented to be a concerned mother, was not keeping the child's appointments with the counselor. Lastly, the reports indicate the Defendant was of dull normal intelligence. Taking this all into consideration this Court does not find the failure to introduce these reports was a professional deficiency.

B. In Paragraph "86" of the 3.850 the defense claims trial counsel failed to adequately present other readily available mitigation evidence. This is perhaps the most difficult assertion to analyze. Here more than any other area there is tendency to second guess. In every case that is lost counsel may go back, with the advantage of hindsight, and say this or that should or could have been done.

The defense had the Defendant's mother testify during the sentencing phase. She did establish the Defendant's home life was not good; his parents were separated; he was hyperactive with a low IQ and a learning disability; he had psychological problems; that his mother loved Ted. The psychological reports would have been cumulative to the mother's testimony. It also must be stressed that the trial court did list and consider these matters as mitigating factors.

As to the information set forth in exhibits "7" and "8" the Court questions the importance of the information from the Defendant's former teachers. Obviously much time had passed since they had contact with the Defendant. Their testimony was of doubtful value.

Perhaps the defense should have had the Defendant's other relatives testify on his behalf. While to a large degree it may have been cumulative to that of the mother, perhaps it may in someway [sic] have helped the Defendant. But this Court cannot conclude that trial counsel was deficient in presenting the mother alone. It must be remembered that the area of who trial counsel selects to testify is fraught with peril. Even the mother, who was an effective defense witness, did admit her son was involved in drug related problems in New York. So trial counsel is caught in a dilemma. He must try to put on mitigating evidence yet not let the State have an opportunity to further damage the Defendant either by cross or rebuttal. This is especially true where the Defendant was charged with several other armed robberies and apparently was having drug related problems in New York City. All in all the Court finds trial counsel was not deficient in only presenting the mother's testimony. This is a matter of trial strategy and should not be second guessed.

. . . .

6. This Court must view trial counsel's alleged errors and omissions in light of the case as a whole. It was a difficult case from the defense standpoint. The Defendant confessed to the crime.

Efforts to suppress the confession failed. The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well. There was little the defense could do to save the Defendant after that.

> Additionally, the aggravating factors in this case strongly outweighed the mitigating factors. There were four aggravating FN5 and only two mitigating factors. The mitigating factor of age was not strong. The Defendant was at the point where his age was not that much of a consideration. Other non-statutory mitigating factors were in fact established by the defense. They were considered by the jury and the court. These mitigating factors were not particularly significant. This Court finds that even if the non-statutory mitigating factors were bolstered by teacher's statements, comments of relatives, and poems of the Defendant, the result would be no different.
>
> 7. The Court concludes that the *Knight/Strickland* tests are not met. The trial defense was not deficient, nor did it prejudice the Defendant. The Defendant received a fair trial and a fair sentence hearing.

The Supreme Court of Florida summarily affirmed, stating:

> In his next point, Herring contends that an evidentiary hearing was necessary to decide his ineffective-assistance-of-counsel claims. The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *Knight v. State*, 394 So. 2d 997 (Fla. 1981). We agree with the trial judge's findings and commend him for his detailed explanation.

Herring v. State, 501 So. 2d 1279, 1280 (Fla. 1986).

> FN5 As explained in Section I.B., one of these aggravating factors was stricken by the Florida Supreme Court subsequent to the state trial court's 3.850 decision.

As set out in Section II.A. above, our review of state court decisions is very deferential under § 2254, as amended by AEDPA. "AEDPA modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 768 (11th Cir.) (citation and internal quotation marks omitted), *reh'g and reh'g en banc denied*, 82 Fed. Appx. 224 (11th Cir. 2003), *cert. denied*, 540 U.S. 1222, 158 L. Ed. 2d 159, 124 S. Ct. 1513 (2004). We may grant a § 2254 petition as to a claim adjudicated on the merits in state court only if adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . .; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To be entitled to deferential review under 28 U.S.C. § 2254, it is not necessary for the state court to explain its decision. Even a summary, unexplicated rejection of a federal claim qualifies as an adjudication entitled to deference under § 2254(d). *Parker*, 331 F.3d at 775-76; Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1253-55 (11th Cir.), *reh'g and reh'g en banc denied,* 34 Fed. Appx. 393 (11th Cir. 2002), *cert. denied*, 538 U.S. 906, 155 L. Ed. 2d 225, 123 S. Ct. 1511 (2003). Moreover, factual findings made by the state courts are presumed to be correct; a petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The state trial court judge who issued a ruling on Herring's ineffective-assistance-of-counsel claim is the same judge who presided at trial. The state trial judge was, therefore, intimately aware of everything that happened at, and was involved in, the trial. In an attempt to obtain similar familiarity, we have reviewed the entire record. It is evident from our review that the state court rulings were eminently reasonable and were not contrary to clearly established federal law.

We turn first to Herring's contention that Quarles did not perform a meaningful investigation into his mental condition. The state court

FN6 concluded Herring established neither deficient performance nor prejudice. The record supports the state court conclusions.

> *FN6* The Florida Supreme Court expressly stated it agreed with the trial judge's findings. We use the term "state court" in this discussion to refer to the state trial court and the Florida Supreme Court.

Contrary to Herring's contention, it is evident from the record that Quarles did investigate Herring's mental condition. Prior to trial, the defense had Herring evaluated by Dr. William Friedenberg, a clinical psychologist. The State subsequently took Dr. Friedenberg's deposition. In that deposition, Dr. Friedenberg said he had been appointed to evaluate Herring and had considered Herring's "ability to testify about the kind of charges against him and the events as they were reported by others." Dr. Friedenberg testified that, to aid in his evaluation of Herring, he had a 1974 St. Luke's Hospital evaluation of Herring; a report evaluating Herring's oral reading and written language; a copy of the autopsy request form from this case; and a supplemental report by the Daytona Beach Police Department. Dr. Friedenberg also had a closed 1980-81 HRC (Human Resources Center) file, which included a psychological evaluation dated October 30, 1980, reports from psychiatrists, a report on an EEG, and some notes.

In conducting his evaluation, Dr. Friedenberg saw Herring for about three hours. He stated Herring was anxious, but not abnormally so considering the circumstances. Also, Herring became increasingly animated in saying he was innocent and had been set up. Herring denied being at the murder scene.

Dr. Friedenberg administered some tests, but he did not perform an IQ test on Herring; rather, he relied on a 1974 test showing an IQ of 81 and a 1980 test showing an IQ of 82. Dr. Friedenberg said the consistency of the two results led him to believe it was not necessary to readminister an IQ test.

Dr. Friedenberg stated Herring was of dull normal intelligence, but that "would be significantly above what would be considered

borderline, retarded or retarded range and includes approximately fifteen percent of the population." He further stated: "One has to understand that Mr. Herring has a rather limited formal education and *there are many studies to show that that can affect I.Q. tests such as* this by lowering the actual score below what the potential would be." Dr. Friedenberg opined that Herring's IQ should not affect his ability to be a law abiding citizen and would only minimally interfere with Herring's ability to deal with the legal process.

Dr. Friedenberg's mental health conclusions from his evaluation of Herring were as follows:

> He appeared to be most likely a person who would be described as an antisocial personality type who may have some additional problems but in the whole seems to be responding with some anxiety to the situation of having been caught and charged with a crime which holds a rather strong penalty. I did not find him unable to stand trial nor did I have any evidence to show that he was legally not sane at the time of the commission of the alleged crime.

Regarding the diagnosis of Herring as having an antisocial personality, Dr. Friedenberg stated antisocial personality is a recognized form of mental illness that, at the time of the deposition, was not very amenable to treatment. Dr. Friedenberg described the antisocial personality as guiltless, highly aggressive, impulsive, highly sensitive to social criticism, untruthful when it serves the individual's purposes, unable to profit from experience, and having its own sense of morality (coinciding very little with society's sense of morality). Dr. Friedenberg further stated Herring did "not suffer from psychosis or anything that could be considered a gross disturbance of emotional functioning." As for Herring's remorse, Dr. Friedenberg stated: "I think his remorse as far as the one crime that he did admit to was primarily based on the fact that he was caught."

The defense decided not to use Dr. Friedenberg at trial. The State, however, understandably tried to present testimony from Dr. Friedenberg. The State's proffer was that Dr. Friedenberg had made

the following determination: "That the Defendant's personality and character is antisocial. And that he has sufficient and normal intelligence to understand and appreciate his criminal conduct and so forth, in this particular case." The defense objected to the admission of testimony from Dr. Friedenberg, contending, *inter alia*, that the State's use of his testimony was barred under the rule pursuant to which Dr. Friedenberg's evaluation had been obtained by the defense. The trial judge concluded Dr. Friedenberg could not be used as a prosecution witness.

The fact and nature of Dr. Friedenberg's evaluation support the following conclusions. First, Herring's allegation that counsel did not perform an investigation is unsupported. In his brief, Herring contends:

> Quarles did not follow up on [the St. Luke's] reports [in his possession] to understand what they meant and did not obtain the testimony of a mental health expert, who could have competently explained the meaning of an I.Q. test to the jury and could have testified about Herring's mental retardation and brain damage.

This contention simply is not supported by the record. Quarles did consult an expert. Second, the record supports an inference that the case Quarles put on was the product of a tactical decision made after investigation. Quarles knew the substance of Dr. Friedenberg's conclusions and decided to keep the evaluation and Dr. Friedenberg's opinions out of evidence--in fact, he fought to keep Dr. Friedenberg from testifying before the jury. Finally, there was no prejudice to Herring due to Quarles' conduct.

We consider next Herring's claim that his counsel should have investigated his background and presented additional character witnesses. In rejecting this claim, the state trial court stated much of the testimony proffered by Herring was dated and of doubtful value. The state trial court concluded that, given Herring's history of drug involvement and other robberies, as well as counsel's dilemma of putting on mitigating evidence without giving the State an opportunity

to further damage the defendant, Quarles' performance was not deficient in presenting the testimony of Herring's mother only. The state trial court further concluded Herring failed to establish prejudice. The state court conclusions have abundant support in the record.

The information as to which at least two of the proffered character witnesses could have testified would have been somewhat dated. Moreover, although one conviction for robbery was admitted into evidence, there were a number of convenience store robberies as to which evidence was not admitted. The other convenience store robberies were discussed by Herring during his taped statements to police. The trial record reflects, however, that other crimes evidence was redacted from the taped statements played for the jury during the guilt phase. In fact, the state trial court judge excluded evidence of other robberies (aside from the one conviction used as a statutory aggravating factor) from the penalty phase due to defense counsel's agreement not to present mitigating testimony as to Herring's lack of a significant history of prior criminal activity.

As for Herring's drug involvement, the record shows Herring himself made statements to a correctional officer regarding his drug activities in New York. Herring admitted to the correctional officer he had been selling drugs and had been cutting the drugs to make more money. FN7

> FN7 The correctional officer was proffered by the State as a witness to impeach Meyers, but the State withdrew him when it concluded his testimony would not "impeach[] or comment[] on the credibility of a prior witness."

We turn next to Herring's claim that Quarles was ineffective in failing to introduce reports, including reports from St. Luke's Hospital, regarding Herring's mental condition that were in his possession at the time of trial. The state trial court concluded the reports were not uniformly favorable to Herring, the defense did establish Herring's learning and psychological problems through his mother, and Quarles' failure to introduce the reports into evidence was not a professional deficiency. The state trial court further held Herring failed to establish

prejudice. The state court rulings are supported by the record. The reports were dated and were not uniformly favorable to Herring's case. The state court resolution of Herring's claim is further supported by the fact and nature of Dr. Friedenberg's evaluation of Herring.

Upon review of the record before the state courts, the state court resolution of Herring's claims was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and did not result in a decision that was based on an unreasonable determination of the facts.

b. *District Court Decision*

The district court denied Herring's ineffective-assistance-of-counsel claim, concluding the state court did not reach a decision that was "contrary to, or [that] involved an unreasonable application of, clearly established Federal law . . . [and was not] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The district court further stated:

> Petitioner argues that counsel failed to present any evidence in mitigation and that he should have obtained documentary evidence regarding Petitioner's mental disability and serious emotional problems. Petitioner identifies a report detailing Petitioner's psychological and emotional problems while at the Wiltwyck School and character witnesses who would have testified on his behalf.
>
> As to issue one, the trial court denied it based on the following: 1) at least one of the reports resulted from an interview done when Petitioner was 13 years old; 2) Petitioner's counsel was able to establish learning disabilities and psychological problems through the testimony of Petitioner's mother; 3) one of the reports established that Petitioner's mother did not keep Petitioner's appointments with the counselor; and 4) the reports reflect that Petitioner was of dull normal intelligence.

The record supports the trial court's findings, and the Court agrees that Petitioner has not shown that his counsel's performance was deficient or that he sustained prejudice. The Court notes that one of the reports resulted from an evaluation performed when Petitioner was 12 years old and that another report described Petitioner as having "intellectual functioning in the dull normal range." The latter report was based on an evaluation done on January 21, 1974, and found Petitioner to have full scale IQ of 81. Moreover, Petitioner's mother testified at sentencing that Petitioner was a "hyperactive child diagnosed by the doctor, with very low IQ of 80, learning disability." She also testified that Petitioner was treated for psychological problems as a child.

. . . .

Petitioner argues that counsel failed to introduce two psychological reports that diagnosed him as suffering from retardation and other organic neurological disorders. Petitioner identifies two reports from St. Luke's Hospital in New York City, which concern evaluations performed on Petitioner when he was 12 and 13 years old.

The trial court addressed this issue and found it to be without merit. The trial court noted that counsel did present testimony from Petitioner's mother, which revealed that his home-life was poor; that his parents divorced when he was four years old; that he had psychological problems; that he was hyperactive with a low IQ and a learning disability; and that she loved him. The trial court found that the reports would have been cumulative to the mother's testimony.

The record supports the trial court's findings, and the Court agrees that Petitioner has not shown that his counsel's performance was deficient or that he

> sustained prejudice. The Court notes that Petitioner's mother specifically testified at the penalty phase hearing as to Petitioner's low IQ and learning disabilities and as to Petitioner's poor home-life. The report would have been cumulative to her testimony. The Court also notes that one of the reports actually suggests that Petitioner had normal intellectual abilities: "There is also a discrepancy between Ted's intellectual abilities, albeit at a Dull-Normal range, and his actual achievement."

(citations omitted).

Although the district court did not hold a hearing on Herring's ineffective-assistance-of-counsel claim, such treatment of a claim is appropriate where, as here, "a hearing would not assist in the resolution of [petitioner's] claims." *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir.) (citation omitted), *reh'g and reh'g en banc denied*, 48 Fed. Appx. 329 (11th Cir. 2002), *cert. denied,* 537 U.S. 1204, 154 L. Ed. 2d 1047, 123 S. Ct. 1278, *reh'g denied*, 538 U.S. 995, 155 L. Ed. 2d 699, 123 S. Ct. 1825 (2003).

Applying the deferential § 2254 standard of review, the district court correctly affirmed the state court decisions. As set out in Part II.C.1.a. above, the state court decisions were supported by the record before those courts. We further note the district court had before it not only the record that was before the state courts in resolving these issues, but also the record of additional post-conviction proceedings in this case. Nothing in the record of these additional post-conviction proceedings undermines the state court decisions.

Most notably, the post-conviction record includes a December 1991 deposition of Quarles that was taken by Herring's current counsel during proceedings on Herring's claim that Pearl had acted at trial under an impermissible conflict of interest. In his deposition, Quarles stated his theory originally was to get Herring to plead guilty. He said the trial judge had indicated that if Herring pled guilty, he would receive a life sentence. (In his own December 1992 deposition, Pearl testified that he had a similar recollection.) When Herring refused to

plead guilty, Quarles' tactic was to try to convince the jury that Herring was young and ignorant.

In terms of investigation, Quarles stated that he talked to Herring about "possible witnesses, events in his life, relatives." Quarles also testified that he had Herring examined and "a report was produced." He testified that he did not know how to get the childhood reports regarding Herring's mental condition admitted: "I made some attempt to talk to a doctor or two that had examined him and either I couldn't locate them or they had other information or they had other testimony that was detrimental to call as a witness." When questioned specifically about a report from St. Luke's Hospital, Quarles further stated:

> I can't specifically say what I did or if I was able to locate the doctor. I do know that I attempted to locate some doctors, could not -- was unsuccessful [**39] as to one or two or one. It seems to me there was some doctor somewhere, maybe here, that was definitely going to throw in Mr. Herring despite this and this and this, Mr. Herring knew exactly what he was doing and Mr. Herring intended to kill Mr. Heolzelg [sic].

With respect to investigating and presenting character witnesses, Quarles stated that, through his discussions with Herring and Meyers, he concluded there was no one who could attend the trial who might be a good character witness on Herring's behalf.

Again, the state court rulings were sustainable on the record that was before the state courts in ruling on Herring's claims. Moreover, the additional post-conviction record before the district court does nothing to undermine those rulings. We affirm the district court's denial of Herring's claims.

2. *Quarles' failure to contest the heightened premeditation aggravating circumstance*

Herring next contends Quarles' performance was deficient in that he did not object to the applicability of the heightened premeditation aggravating circumstance. Counsel's performance cannot be deemed to have been deficient because, at the time of Appellant's sentencing, the aggravator was interpreted to cover Appellant's case. In fact, the Florida Supreme Court initially affirmed the application of the aggravator to Appellant's case. Moreover, as to the prejudice prong, the Florida Supreme Court subsequently eliminated the aggravator from Herring's case, but nevertheless affirmed the death sentence.

3. *Quarles' failure to object to the avoidance of arrest jury instruction*

Herring contends Quarles was ineffective in that he did not object to the avoidance of arrest instruction. Herring asserts the trial court's instruction was erroneous in two respects: (1) the instruction did not advise the jury that it could find the aggravator only if it concluded beyond a reasonable doubt that eliminating a witness was the dominant or sole motive of the killing; and (2) the instruction did not advise the jury that, under Florida law, the uncorroborated testimony of a single witness may be insufficient to support a finding of an aggravator.

The State contends, as the district court concluded, that Herring's claim is procedurally barred because he never raised it in state court. Herring did not address the district court's finding of procedural bar in his initial brief. In his reply brief, Herring contends he raised the claim in his first 3.850 Motion at P 94. Again, "arguments raised for the first time in a reply brief are not properly before a reviewing court." *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994) (citation omitted); *see also United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002), *cert. denied*, 539 U.S. 951, 156 L. Ed. 2d 643, 123 S. Ct. 2628 (2003); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999); *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996). Although Herring's failure to present argument in his initial brief is determinative, we nevertheless briefly discuss the procedural bar argument Herring raises in his reply brief.

In P 94 of his first 3.850 motion, Herring stated:

> As discussed supra at paragraphs 23 through 48, the cases construing the heightened premeditation and avoidance of arrest aggravating circumstances demonstrate quite clearly that neither of these aggravating circumstances was applicable to this case. Despite the substantial body of case law favorable to petitioner's position, his counsel never contested the applicability of the heightened premeditation aggravating circumstance and made at most a feeble attempt to rebut the applicability of the avoidance of arrest aggravating circumstance. Counsel's failure seriously prejudiced petitioner's sentencing hearing, thereby undermining the fairness of the proceeding.

This statement does not amount to an argument that Quarles was ineffective for not objecting to the avoidance of arrest instruction.

In summary, we reject Herring's claim. The district court found Herring's claim to be procedurally barred. Herring did not address procedural bar in his initial brief. Even if he had properly presented his procedural bar argument, we would have rejected it.

4. *Quarles' failure to object to the cross-examination of Meyers*

Herring next argues that, through its cross-examination of his mother, Dorothy Meyers, the State improperly introduced evidence of a non-statutory aggravating circumstance. He states: "Although it is state law that precludes the admission of a non-statutory aggravating circumstance . . . trial counsel's failure to prevent the admission of this evidence constitutes ineffective assistance of counsel, which is a constitutional issue."

During the penalty phase of Herring's trial, Quarles presented testimony from Meyers that Herring at some point had moved to Florida:

> Q. When did Ted leave your home?

A. Do you mean for Florida or coming down here or . . .

Q. For Florida?

A. Or for the different schools I put him in?

Q. Florida.

A. About a year and a half or almost close to two years.

On cross-examination, the State conducted the following questioning of Meyers:

Q. Mrs. Myers, have you ever had an occasion to talk with a Mr. James B. Brock?

A. I might have. I don't recall the name.

Q. He's a Correctional Probation officer in the State of Florida. Does that help?

A. I believe so.

Q. Did you tell Mr. Brock that the reason you sent your son to Florida, was because your son had become involved in some drug dealings in New York City, and it was necessary for him to get away from New York City quickly, that the word was out that people involved, who were supplying your son with drugs, were out to get him?

A. I didn't say [Pause] of those words, no. I said that he went to the police and testified about some drugs. I don't know what he might have put down there.

Q. You never told anybody the reason he left New York was because he was involved --

A. Well, his life was in danger because, if he would testify against the drug dealers, his life was in danger.

Q. Did he ever testify?

A. No. Because I sent him here.

Q. But, it is your testimony that you indicated to the correctional officer that this involved testimony?

A. Well, let's put it this way. I didn't know if--It never got to trial. He went to the police and informed the police about it.

Q. Did you tell that to the correctional officer?

A. I might have.

Q. Is it possible that you didn't?

A. I really don't remember.

Q. Do you recall telling the correctional officer, Mr. Brock, that your son got involved over his head with drug suppliers and they were blaming him for the missing drugs?

A. I don't remember.

Herring contends this cross-examination was improper and Quarles was ineffective in that he failed to object to it.

In rejecting Herring's claim, the state court concluded:

Yet the door was opened to this cross because on direct the mother testified she sent him to Florida about two years ago. The State had the right and duty to ask why he was sent to Florida. A defense

> objection to this line of questioning would have been overruled.

The Florida Supreme Court agreed with the trial court's findings and affirmed its decision. The district court agreed, holding Quarles' representation was not deficient and Herring had not shown prejudice.

The Florida Supreme Court already has told us how the issues would have been resolved under Florida state law had Quarles done what Herring argues he should have done -- objected to the State's cross-examination of Meyers. It is a "fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters." *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997) (citations omitted). Accordingly, with regard to this claim, we hold Herring cannot establish either deficient performance by Quarles or prejudice. FN8 We therefore reject Herring's argument that Quarles was ineffective in failing to object to the State's cross-examination of Meyers.

> FN8 Although we will grant relief if application of a state law violates a specific federal constitutional right or if a state trial judge's erroneous admission of evidence makes a petitioner's trial "so fundamentally unfair that the conviction was obtained in violation of the due process clause of the fourteenth amendment," *Thigpen v. Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991) (citations omitted), neither circumstance is present in this case.

D. *Conflict of Interest*

The final issue before the Court is Herring's contention that, at the time of trial, Howard Pearl had an impermissible conflict of interest due to the fact that he held the status of special deputy sheriff so he could carry a firearm. In his brief, Herring contends Pearl's "need to carry a concealed weapon, dependent as it was upon maintaining the favor of law enforcement in general and the Marion County Sheriff in particular, who could revoke that privilege at will, is precisely the type of personal interest that may create a conflict as contemplated by the

Sixth Amendment." Herring argues that, as a result of this conflict, Pearl failed to contest the credibility of the law enforcement officers, in fact bolstered their credibility during closing argument, and chose an unreasonable trial strategy that did not require him to challenge the officers. The state court held hearings on this issue and denied Herring's claim on the merits.

After conducting an evidentiary hearing, the state trial judge made the following findings:

> Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family." The sheriff of Marion County in 1970, Doug Willis, apparently granted Mr. Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm. . . . Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.
>
> Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriff's Self-Insurance Fund, he had no criminal law enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff . . . .
>
> Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never

received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and never [was] given the authority to make any arrests, stops or any other duties as a deputy sheriff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified that Mr. Pearl's status was "honorary" in nature and was solely for the purposes of Mr. Pearl being able to carry a concealed firearm.

In addition, James P. Gibson, the Public Defender for the Seventh Judicial Circuit at present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as a special deputy sheriff and that status was honorary and only for the purpose of carrying a concealed firearm. . . . Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a

> concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status. . . .
>
> Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.

Herring v. State, 730 So. 2d 1264, 1267-68 (Fla. 1998) (alteration in original)(quoting trial court's decision). The Florida Supreme Court affirmed, concluding Herring failed to establish that Pearl labored under an actual conflict of interest, and further stating: "The record reveals no evidence suggesting that Herring's interests were impaired or compromised as a result of Pearl's special deputy status." Id. at 1268. Applying the § 2254 standard of review, the district court denied relief.

In *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), the Supreme Court considered a claim of ineffective assistance of counsel in a case where defense counsel represented three codefendants without objection. Id. at 337-38, 100 S. Ct. at 1712. The Court held: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's

performance." *Id.* at 348, 100 S. Ct. at 1718. Subsequently, in *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct 1237, 152 L. Ed. 2d 291 (2002), the Supreme Court rephrased the analysis somewhat and stated an "actual conflict" is what a defendant must establish under *Cuyler* to prove a Sixth Amendment violation. *Id.* at 171, 172 n.5, 122 S. Ct. at 1243, 1244 n.5. The Court defined an actual conflict as (1) a conflict of interest that (2) adversely affected his lawyer's performance. *Id.*

Herring does not take issue with the individual state court findings so much as he contends the state courts unreasonably applied *Cuyler* by "exclusively relying on Pearl's status as a law enforcement officer, and refusing to consider evidence of Pearl's [deficient] performance at trial." Herring argues that under *Cuyler* the issue of whether there was a conflict cannot be divorced from the issue of counsel's performance. The case on which Herring primarily relies is *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998), *abrogation on other grounds recognized by Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001). The petitioner in *Neelley* alleged her attorney suffered from an impermissible conflict of interest where the attorney signed a book deal with petitioner three months after trial and the filing of a motion for a new trial. We concluded that where counsel had competently represented petitioner's interests and no others at trial, it was "not unreasonable for the Alabama Court of Criminal Appeals to find only the existence of a potential conflict of interest, rather than an actual conflict." *Id.* at 926. Contrary to Herring's apparent suggestion, we do not read *Neelley* as eliminating the need for there to be a conflict of interest in the first place. If we were to focus only on the quality of Pearl's trial performance, our analysis would be bound by *Strickland*, not *Cuyler*.

In *Quince v. Crosby*, 360 F.3d 1259 (11th Cir.), *reh'g and reh'g en banc denied*, 104 Fed. Appx. 154 (11th Cir.), *cert. denied*, ___ U.S. ___, 160 L. Ed. 2d 325, 125 S. Ct. 436 (2004), we considered a conflict-of-interest claim by another defendant who had been represented by Pearl. In that case, the state trial court and the district court made findings very similar to those made in the case before us. For example, the state trial court made the following findings:

> Mr. Pearl never was and never has been a law enforcement officer with the Marion County Sheriff's

> Department. Mr. Pearl was in essence granted a concealed weapons permit from the Marion County's Sheriff's Department as many other individuals were at that time. Counter to the defense counsel's assertions, the Court determines from the facts presented that Mr. Pearl had no manifest or actual authority to act as a fully constituted Deputy Sheriff for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

Id. at 1264 (quoting state trial court findings). Moreover, the district court in *Quince* found:

> The uncontroverted testimony was that Mr. Pearl obtained and maintained his special deputy status solely in order to be able to carry a firearm while traveling throughout the state. He had no law enforcement duties, no arrest powers, and no uniform; he received no law enforcement training, no compensation, and no internal memoranda from the Sheriff's Office. The title was merely honorary. Once state law changed to permit Mr. Pearl to obtain a state license to carry a concealed firearm, he resigned his special deputy position.

Id. (quoting district court findings). We concluded in *Quince* there was no conflict. *Id.* at 1264. We reach the same conclusion here.

Given the presumption of correctness attached to the state court factual findings, 28 U.S.C. § 2254(e), and our recent decision in *Quince* considering the very same alleged conflict of interest raised in this case, we cannot say the Florida Supreme Court unreasonably applied *Cuyler v. Sullivan*. On these bases, we affirm the district court's denial of the petition on this ground.

III. CONCLUSION

We hold Herring's claim under *Clemons v. Mississippi* is without merit. We further hold Herring's claim that he received ineffective assistance of counsel at sentencing to be without merit. Finally, we hold the state court did not unreasonably apply *Cuyler v. Sullivan* to Herring's claim that Pearl suffered from an impermissible conflict of interest due to his status as a special deputy sheriff.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

FILED
U, S. COURT OF APPEALS '
ELEVENTH, CIRCUIT

No. 03-12598-P

MAR 2 9 2005

THOMAS K. KAHN
CLERK

TED HERRING,
Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF
CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents-Appellpes.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITIONS) FOR REHEARING AND PETITIONL) FOR REHEARING EN BANC
(Opinion January 31, 2005, 11th Cir., 2005,__F.3 d__).

Before: BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Bane are DENIED.

ENTERED FOR THE COURT:

ORD-42.
(12/01)

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
AUG 11 2005
OFFICE OF THE CLERK

No. 05-16

IN THE

United States Supreme Court

TED HERRING,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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August 11, 2005

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I. THE STATE DOES NOT DISPUTE THAT THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH *CLEMONS* AND *SOCHOR*.

In its Opposition, the State simply reproduces the opinion of the Eleventh Circuit. It does not answer any of the arguments presented in Herring's Petition. In particular, this Court will search in vain for responses to any of the following points:

- Under *Clemons v. Mississippi*, 494 U.S. 738 (1990), the Florida Supreme Court was required either to independently reweigh the aggravating and mitigating circumstances or conduct a harmless error analysis. It did neither, and its opinion is plainly inconsistent with *Clemons*.
- The Florida Supreme Court's failure to meet the *Clemons* standard is particularly obvious because of an unusual coincidence. On the same day it decided *Herring*, May 2, 1991, it also decided *Sochor v. Florida*, 580 So. 2d 595 (Fla. 1991), a case later reversed by this Court pursuant to *Clemons*. *Sochor v. Florida*, 504 U.S. 527 (1992). The State does not address the similarity between *Herring* and *Sochor* or attempt to explain why, if *Sochor* was reversed, the *Herring* decision should stand.
- The State fails to address Herring's argument that the Eleventh Circuit applied an incorrect definition of procedural default. In particular, the State makes no effort to reconcile the Eleventh Circuit's reasoning with the standard articulated by this Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992): "Once a federal claim is properly presented, a party can make any argument in support

> of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534; *see also Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

Perhaps most inexcusably, the State does not explain the inconsistency in its own position. In responding to Herring's habeas corpus petition in the federal district court, the State acknowledged repeatedly that Herring had properly asserted a *Clemons* claim in the Florida state courts, and that the Supreme Court had decided the claim on the merits. An excerpt from the State's district court brief makes this clear:

> Herring raised this claim in his 1988 *Florida Rule of Criminal Procedure* 3.850 motion. The collateral proceeding trial court denied relief, and the Florida Supreme Court affirmed the denial of relief on this claim. . . .
>
> Because the Florida Supreme Court decided this claim on the merits[3], the writ of habeas corpus cannot be granted unless that merits determination is contrary to, or an unreasonable application of, precedent announced by the United States Supreme Court, or is an unreasonable determination of the facts in light of the evidence from the state court proceeding.
>
> [3] The Florida Supreme Court could have decided this claim on procedural bar grounds, but elected to reach the merits of this claim because of the highly unusual posture of this case. *Herring v. State*, 580 So. 2d at 137-8.

(SA-1-3.[1])

[1] The Supplemental Appendix hereto is cited as "SA-__."

The State thereby waived any claim of procedural default in the district court. Not only was that forbearance correct as a matter of law; the State is now bound by it. *See Gray v. Netherland*, 518 U.S. 152, 166 (1996); *Esslinger v. Davis*, 44 F.3d 1515, 1525-28 (11th Cir. 1995).

Finally, the State suggests that Herring's *Clemons* claim is procedurally defaulted because Herring did not argue the issue of procedural bar in his initial brief in the Eleventh Circuit. The failure to raise an argument in an opening brief does not implicate the doctrine of procedural default. That doctrine is grounded in "considerations of comity and concerns for the orderly administration of justice." *Dretke v. Haley*, 541 U.S. 386, 392-93 (2004). It provides, in essence, that a federal court will not address an issue where a state court has not had the opportunity to do so. That is not what happened here. The issue of procedural bar was addressed in four separate submissions to the Eleventh Circuit: the State's answering brief; Herring's reply brief; post-argument letters submitted both by Herring and the State. The Eleventh Circuit had every opportunity to address the argument, and did so.

II. HERRING WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL.

In the past five years, this Court has issued three decisions which address in detail the obligations of defense counsel in the penalty phase of a capital case. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005). The State does not even attempt to measure the perform-

ance of Herring's counsel, Peyton Quarles, against the standard set by these cases.

In particular, the State offers no explanation or excuse for any of the following aspects of Quarles performance, all of which demonstrate that he afforded Herring a defense which fell below even the most lenient standard of effective performance.

1. Quarles conducted no investigation in preparation for the sentencing phase, except for perfunctory interviews of Herring and his mother. Although Quarles employed the services of an investigator, that investigator was not asked to prepare for the sentencing phase.

2. Quarles had in his possession records from St. Lukes Hospital in New York, where Herring had been treated as a child, stating that Herring had signs of "brain dysfunction," "neurological dysfunction," "psychoneurotic disorder," and that he was "undoubtedly functionally retarded." Quarles submitted none of these records at the sentencing phase.

3. Quarles admitted that he did not know how to offer the St. Lukes records in evidence. There can be no more convincing demonstration of ineffective assistance than a lawyer whose ignorance of the rules of evidence disables him from putting crucial documents in evidence.

4. Because Quarles' inadequate investigation had located no expert witnesses and his incompetence prevented him from putting relevant documents in evidence, the only evidence he offered of Herring's low I.Q. was the testimony of Herring's mother, who was compelled to admit on cross examination that she did not understand what I.Q. scores meant. The prosecutor deliberately exploited her ignorance in summation.

5. Besides talking to Herring and his mother, an inquiry that yielded nothing, Quarles made no effort to locate character witnesses. Subsequent efforts by the counsel representing Herring in his post conviction proceedings located six witnesses, all of whom submitted affidavits attesting to Herring's positive qualities.

The State makes no effort to reconcile Quarles' performance with this Court's prior decisions because it cannot. This Court has made clear that defense counsel is obligated "to conduct a thorough investigation of the defendant's background," *Williams v. Taylor*, 529 U.S. at 396, and that counsel has a duty to "explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla*, 125 S. Ct. 2456, 2466.

The State does not defend the Eleventh Circuit's conclusion that Quarles met the test of competence because he consulted Dr. William Friedenberg on the issues of sanity and competence to stand trial. In reaching this conclusion, the Eleventh Circuit completely ignored the distinction between guilt phase evidence and sentencing phase mitigation. It is now beyond question that competent defense counsel is obligated to pursue both issues; a guilt phase inquiry does not remedy sentencing phase deficiencies. This distinction has been recognized in the decisions of several other Circuits. *Hendricks v. Calderon*, 70 F.3d 1032, 1037, 1043-44 (9th Cir. 1995); *Starr v. Lockhart*, 23 F.3d 1280, 1289-90, 1293 (8th Cir. 1994); *Clabourne v. Lewis*, 64 F.3d 1373, 1384-87 (9th Cir. 1995); *Harries v. Bell*, No. 02-6886, 2005 WL 1796224, at *5-6 (6th Cir. July 28, 2005); *Powell v. Collins*, 332 F.3d 376, 395 (6th Cir. 2003).

In *Hendricks*, the Ninth Circuit held that "where counsel is on notice that his client may be mentally impaired,

counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." *Id.* The Ninth Circuit further held that "[t]he prosecution takes an all or nothing approach, contending that if the investigation into mental defenses in the guilt phase was sufficient to foreclose further investigation in the guilt phase, it must be sufficient to foreclose investigation into mitigation based on mental condition in the penalty phase as well. The differing legal standards in the guilt and penalty phases render this argument a non sequitur." *Id.; see also Starr*, 23 F.3d at 1289; *Powell*, 332 F.3d at 383-84, 395-96 (retention of mental health expert for competency hearing and guilt phase was insufficient to prepare for the sentencing phase).

The State makes no effort to buttress or justify the Eleventh Circuit's conclusion that "the case Quarles put on was the product of a tactical decision made after investigation." (A-170). No responsible review of Quarles' performance—and we invite this Court to make as thorough a review as it wishes—could yield that conclusion. The only possible conclusion is that Quarles was a poorly prepared novice who did, in his own words, "a lousy job." In *Wiggins* this Court noted: "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." 539 U.S. at 526-27. Those words apply with particular force to the Eleventh Circuit's conclusion that Quarles' performance was the product of strategic choice.

Notwithstanding Quarles' ineptitude, the jury's vote for death was only 8-4. Had Herring been represented by a competent lawyer who could have presented the mitigating evidence that was readily at hand, he would not be facing execution for a "robbery/murder [that] differs little from many others wherein the death penalty was deemed inappropriate." *Herring v. State*, 580 So. 2d 135, 139 (Fla. 1991) (Barkett, J., dissenting).

III. HERRING'S *MIRANDA* CLAIM WAS NOT PROCEDURALLY DEFAULTED, AND THE ELEVENTH CIRCUIT ERRED IN DECLINING TO HEAR IT.

The State offers no response to Herring's argument that the admission of the White testimony violated *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Estelle v. Smith*, 451 U.S. 454 (1981). Although it claims that Herring's argument was procedurally defaulted, the Florida Supreme Court addressed the issue on the merits and thus cured any procedural default.

When the State sought to introduce White's testimony at trial, Herring's counsel objected and thus preserved the point for appellate review. Herring's appellate counsel failed to raise the issue on direct appeal to the Florida Supreme Court. Herring later petitioned the Florida Supreme Court for a writ of habeas corpus, alleging ineffective assistance of appellate counsel. *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988) (A-40). In denying Herring's petition, the Florida Supreme Court decided Herring's *Miranda* claim on the merits:

> Controlling case law establishes that a warning and waiver of rights given following the arrest for a

> criminal offense is sufficient to cover any later statements to a law enforcement officer concerning other criminal offenses. *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). There is no necessity to continually readvise an individual in custody as to his or her *Miranda* rights, particularly when the place of custody is the same and the time periods are not remote. It is not disputed that the probation officer talked to Herring concerning the homicide only after Herring had been taken into custody, *Miranda* warnings had been given, and Herring had executed a waiver of his rights. We find the statement was clearly admissible and, consequently, appellate counsel was not deficient in failing to raise this issue.

Herring v. Dugger, 528 So. 2d at 1178 (citations omitted); (A-45).

This is beyond question a merits decision; indeed, a Florida court cited it in analyzing a *Miranda* claim. *See State v. Jones*, 763 So. 2d 1180, 1180 (Fla. Dist. Ct. App. 2000) (citing *Herring* for the proposition that "a warning and waiver of rights given following the arrest for a criminal offense is sufficient to cover any later statements"). If a state court decides a procedurally defaulted claim on the merits, that decision cures the procedural default. *Peoples v. Campbell*, 377 F.3d 1208, 1235 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 2963 (2005); *Villot v. Varner*, 373 F.3d 327, 335 (3d Cir. 2004). Hence the State's invocation of procedural default does not answer Herring's argument.[2]

[2] In addition, the ineffective assistance of Herring's appellate counsel constitutes "cause" which would excuse procedural default by Herring even if it existed. Courts routinely have held that the errors of

Without recourse to procedural default, the State has nothing to say. In particular, it does not contest that:

- Mary White, a probation officer, interrogated Herring in custody without administering *Miranda* warnings.
- The State does not know when this interview took place; it could have occurred as long as seventeen days after Herring's arrest, the only time he received *Miranda* warnings.
- The admission of this testimony at the penalty phase trial was in clear violation of *Estelle v. Smith*, 451 U.S. 454 (1981).
- The prosecutor violated Herring's Fifth, Sixth, and Fourteenth Amendment rights as well as Rule 3.220 of the Florida Rules of Criminal Procedure by not giving the defense notice of the substance of White's testimony, particularly its racially inflammatory character.

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appellate counsel may satisfy the cause requirement of this Court's procedural default doctrine. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Had Herring's appellate counsel raised the Miranda claim on direct appeal, the Florida Supreme Court would have been required to vacate Herring's death sentence under *Estelle* and *Miranda*. Had counsel raised the State's clear violation of Florida's notice requirement, the surprise use of White's testimony would also have led to reversal.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Court (a) grant certiorari review; (b) summarily reverse pursuant to *Clemons* and *Sochor*; or (c) vacate and remand in light of *Miller-El* and *Rompilla*.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

EXCERPT OF STATE RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, FILED FEBRUARY 4, 2000

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1. THE "INVALID AGGRAVATING CIRCUMSTANCE" CLAIM

In claim 1 of the petition (pages 22-30 of the addendum), Herring argues that he is entitled to relief because the Florida Supreme Court "struck" the cold, calculated, and premeditated aggravating circumstance in his case, and did not subsequently conduct the "analysis mandated by *Clemons v. Mississippi*" in upholding his sentence of death. Herring raised this claim in his 1988 *Florida Rule of Criminal Procedure* 3.850 motion. The collateral proceeding trial court denied relief, and the Florida Supreme Court affirmed the denial of relief on this claim. Specifically, the Florida Supreme Court held:

> With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla. 1989),

our decision in *Rogers*, restricting the applicability of the cold, calculated, and premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroactive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. **Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been dif-**

> **ferent had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.** *See Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

Herring v. State, 580 So.2d at 138. [emphasis added].

Because the Florida Supreme Court decided this claim on the merits[3], the writ of habeas corpus cannot be granted unless that merits determination is contrary to, or an unreasonable application of, precedent announced by the United States Supreme Court, or is an unreasonable determination of the facts in light of the evidence from the state court proceeding. 28 U.S.C. §2254(d). Under the posture of this claim, the "contrary to/unreasonable application of precedent" standard is the one that applies—when that evaluation is conducted, there is no basis for federal relief.

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[3] The Florida Supreme Court could have decided this claim on procedural bar grounds, but elected to reach the merits of this claim because of the highly unusual posture of this case. *Herring v. State*, 580 So.2d at 137-8.